

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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DISTRICT COURT OF THE
APR 12 1939

Joseph W. Smith

United States Court of Appeals for the District of Columbia

APRIL TERM, 1939—No. 7461.

MARY ELEANOR HOHENSTHAL

v.

HOWARD LEE SMITH,

Appellee.

Appeal from the District Court of the United States for the District of
Columbia.

BRIEF FOR APPELLANT.

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United States Court of Appeals for the District of Columbia

APRIL TERM 1939.

No. 7461.

MARY ELEANOR HOHENTHAL,	}
Appellant,	
vs.	
HOWARD LEE SMITH,	
Appellee.	}

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANT.

Jurisdictional Statement.

Pursuant to Title 18, Chap. 2, sec. 26, 1929 Code, D. C., this appeal was taken from a final judgment of the District Court of the United States for the District of Columbia, dated May 12, 1939 (R. 16), in favor of appellee, Howard Lee Smith, a local physician and surgeon, defendant below, on verdict of a jury, directed by the court (R. 17, 234), over objection and exception of appellant, Mary Eleanor

Hohenthal, plaintiff below (R. 234-5), at conclusion of plaintiff's case in chief, upon motion of defendant (R. 231-2), in a mal-practice case, brought by plaintiff against defendant, for damages, plaintiff having sustained serious, permanent injuries, and also loss of income due to inability to pursue her vocation (R. 3, 5).

Parties will be referred to as aligned in the trial court.

May 29, 1939, notice of appeal was filed (R. 17). Statement of Points was filed May 26, 1939 (R. 19-20).

Motion (R. 18) of plaintiff to prosecute appeal in *forma pauperis* was granted by trial court (R. 21). A similar order was made by this court upon application of plaintiff. Certified transcript of record, therefore, remains in typewritten form.

Stipulation (R. 22) was entered into by counsel for respective parties as to correctness of statement of evidence and proceedings at trial which are contained in record at pages 23-230.

STATEMENT OF CASE.

Pleadings.

The declaration (R. 1-5), and a substituted amendment to it, allege, in substance, that plaintiff consulted defendant about January 20, 1936, in his professional capacity as practicing physician and surgeon, for treatment and operation for a gall bladder ailment; that defendant was engaged by plaintiff for reasonable compensation to treat and operate upon plaintiff, with usual, proper and diligent care prior and subsequent to operation; that on January 23, 1936, defendant entered plaintiff in Emergency Hospital, this city; that on January 24, 1936, plaintiff was

administered a general anaesthetic, and was operated on by defendant for gall bladder disability; that immediately following operation, an interne, one Henry L. Peckham, Jr., at Emergency Hospital, acting under direction of and as assistant to defendant, Dr. Smith, administered a hypodermoclysis on right side of plaintiff's body beneath her breast, and to right of it, between fourth and fifth ribs, using a subcutaneous needle; at that time, and several hours after the operation, plaintiff was unconscious, as a result of general anaesthetic administered to her (R. 3), and in some manner, then unknown to plaintiff, although defendant had prompt notice of it, point of the needle (about two inches in length and hollow, and through which injection of saline and glucose were administered to plaintiff) broke off and became lodged in plaintiff's breast; it was not until March 7, 1936, six weeks thereafter, that defendant first advised plaintiff that this foreign substance had been broken off and which he had permitted to remain in plaintiff's body; as a result of the breaking the needle off and permitting it to remain in plaintiff's body for that period, plaintiff sustained serious permanent injuries, suffered and still suffers great mental and physical pain; her nervous system became permanently shocked and impaired; she lost \$2,000 income, being prevented from pursuing her usual vocation as professional photographer and artist (R. 3).

The second count (R. 3) charged negligence by failure of defendant to promptly remove the broken needle from plaintiff's body, with allegations of plaintiff's injuries, loss of income, and physical and mental suffering (R. 3, 4, 5).

Substituted amendment (R. 15) to declaration alleges that, as a result of the negligent breaking off of needle in plaintiff's body, and defendant's negligence in permitting it to remain therein, it was necessary

for plaintiff to undergo four subsequent operations in the endeavor to obtain use of her right arm, to reduce pain, physical and mental suffering, and in an effort to restore her health (R. 15).

First pleas (R. 8-12) of defendant admitted the professional engagement, and set forth an argumentative and colored narrative, but, in substance, defendant admitted the giving of the hypodermoclysis; that it was post-operative treatment; that Dr. Peckham, interne, gave it; admits that defendant ordered the interne to give it; that it was given to plaintiff while she was under residual effect of general anaesthetic; that when needle was inserted, plaintiff caused her body to lurch and twist, causing needle to break off (R. 9); plea alleges, although contrary to defendant's previous allegations, that the interne was employee of Hospital and was acting under its supervision and control; plea admits defendant had immediate notice of needle being broken off and that plaintiff knew nothing about it until date that she alleged, namely, March 7, 1936 (R. 9); defendant admits in his plea, he made no effort to remove needle, but did not explain in his plea why, except that it caused no infection or pain (although plaintiff *was* suffering pain and complaining) he felt it inadvisable to remove it.

Defendant's plea alleged the stock defense (R. 10) of physicians, *i. e.*, that he was acting in accordance with the usual routine and accepted standards of other physicians similarly practicing surgery, and his best judgment.

The plea alleges that plaintiff has fully recovered, has suffered no damages; that plaintiff was conscious and knew that injection was being given her and that her body lurch and twisted, causing the needle to break off and to become lodged in her breast. The plea denies that she had pain and suffering.

and denies that the interne was his agent, and that, in his judgment, it was improper and inadvisable to remove from plaintiff's body this sharp, pointed instrument, two inches in length (R. 11).

Defendant filed (R. 14) an additional plea, in which he says that the needle used in administering the hypodermoclysis was latently defective, and that said latent defect caused the needle to break off, notwithstanding his previous allegation that there was no defect in the needle that might cause plaintiff pain or difficulty (R. 14).

The Evidence.

Plaintiff testified (R. 37-73) that she was an artist and photographer. Became acquainted with defendant in August, 1935, when she employed him to treat her professionally. He first operated on her in fall of 1935, discharging her October 7, 1935 (R. 38).

January 17, 1936, plaintiff consulted defendant in reference to performing operation on her for gall bladder disability (R. 38). Defendant wrote a slip, marked "cholecystectomy," and entered her into Emergency Hospital January 23, 1936. She arrived at hospital about 8:30 p. m., and was put to bed (R. 39). She was given a sleeping tablet and went to sleep. About 11:00 o'clock, an interne took her case history. A nurse came to her room next morning (January 24, 1936) and dressed plaintiff for operation. About 8:25 a. m., the nurse said: "Dr. James is coming to give you anaesthetic now." In several minutes Dr. James gave her anaesthetic and plaintiff remembered being wheeled out of the room (R. 39). Next thing plaintiff remembered was when she awoke and felt cold on her right side. She saw an open fresh wound, which was not bandaged (R. 40). She remarked to nurse: "Hm, the knife must have slip-

ped'' (R. 40). When plaintiff started to put her hand on it, the nurse held her hands. Plaintiff asked the nurse the time, who told her, quarter after three. Plaintiff fell asleep and remembered nothing until about 7:00 o'clock, when the nurse told her, "Dr. Smith is out in the hall." Plaintiff complained that she had a splitting headache and the doctor ordered ice cap for her (R. 40). Plaintiff had a terrible feeling. She could not remember where she lived or her new address, and started to cry (R. 40). Plaintiff was given general anaesthetic about 8:30 a. m., and awakened about 3:15 p. m., and did not know at that time that the hypodermoclysis needle had been broken off in her body. The second night plaintiff inquired of the nurse: "Do I have a special nurse?" and she said: "Why, yes. Didn't you know that?" and plaintiff said "No" (R. 41). Plaintiff wondered why she was receiving so much attention. Defendant came in every day. Following the operation, on Thursday or Friday, plaintiff began to have sharp pains in her thoracic region. On Sunday following, she was in great pain, like a hot knife going through her body. The interne, to whom plaintiff complained, wanted to know if the pain was where the gall bladder had been removed (R. 42). Plaintiff indicated the region (where she afterwards learned the needle had broken off) and the interne told her he would remove the tube, which had been inserted in her body to drain the region where she was operated. Defendant, when he learned the interne had pulled out the drain, turned to him and said: "If anyone is going to take care of this girl, I will do it. I don't want anyone touching her again."

Plaintiff testified that every movement of her body caused a pain to shoot through her body (R. 43). At two o'clock on the following day, plaintiff had fever. At 7:00 o'clock that night defendant came and inquired, "Where does it hurt?" and "Does it hurt

way down here," referring to gall bladder operation. Plaintiff replied: "No, it does not, it hurts up here," indicating her right breast.

Monday night, February 3, following operation, she had fever. Following afternoon plaintiff cried due to pain (R. 44). She reached for the telephone and said to the doctor: "*It feels like a sharp pain all through my chest. I have no cold, but it feels like when I had pneumonia. It is a sharp pain going through my chest.*" At 7:00 o'clock that evening (R. 44) defendant came, and said: "*You get your symptoms one day, and then you start complaining the next.*" Now there is nothing wrong with you, but I certainly did lose plenty of sleep over you last night. If you don't behave yourself I will have to put the tube back in you" (R. 44).

On February 5, when nurse came to give her a bath, she started to roll plaintiff over on her right side. Plaintiff said: "*Oh, don't do that, it feels like a terrible boil there. Please don't do that*" (R. 45). The nurse replied, "*Oh, come on, you were rolling over all right last week.*" The nurse rolled plaintiff in spite of plaintiff's protests. The next day, in accordance with defendant's orders, plaintiff sat up for about fifteen minutes, and in doing so, plaintiff threw her arm around nurse's neck to help raise herself; that she had most terrible pain, like a sword going through her side, just as if it was stuck in that region. Following that, plaintiff had fever. February 10, 1936, defendant discharged plaintiff (R. 46). She was taken home in an ambulance. Two days after, defendant visited her, when plaintiff complained of pain in her side.

On Saturday following, when she saw defendant, she stated: "*I'm having awful pains all through here—it feels like a pocket of pus in here*" (referring to her right side where the needle had become lodged in her breast). Defendant advised her: "*Well, just take*

your thumb and keep pushing on that as hard as you can. Keep pushing it forward all the time. That ought to fix it up." Defendant complained that he could get no help during the operation (R. 47).

February 27 plaintiff visited defendant at his office, but he did not look at the scar, which was black, about two inches in length, at the point where the needle was inserted in her body. When plaintiff complained of pain in her side, defendant warned her: "Now, if you complain any more, I'll put the tube back in you." Plaintiff replied: "Oh, you can't do that. It is all healed. It is grown over." Defendant said: "It is easy enough to punch another hole in you" (R. 48).

Defendant told her to come back in about ten or twelve days. Plaintiff returned on March 7 to his office. Defendant asked plaintiff if she wanted sun-ray treatments, saying they would not cost her anything (R. 49).

Plaintiff was called to defendant's examination table; defendant took her by the arm, started to stroke it. Plaintiff did not know what defendant's idea was. He said, "Well, I will tell you. We had a little accident at the hospital. My interne there broke off a needle in you (R. 49, 50). It is still there. We will have to take it out before it either causes an infection or moves down to a danger zone. Come to the other room and I will show you what kind of needle it was." Plaintiff and defendant went into the other room. Defendant got a sub-Q needle, and said: "This is what broke off in your side. Of course, it was rusty, but you needn't tell anybody about it. Don't tell anybody at all. You can tell your family that you are going to a show or something, and you can come down and we will take it out." Plaintiff said: "I certainly am relieved to find out what that pain was caused by." Defendant

patted plaintiff's arm and said: "Don't tell anybody, don't tell anybody at all" (R. 50).

That day, March 7, plaintiff saw a doctor in an adjoining office, Dr. Krause, and she went back on March 9, and as a result of her conversation with Dr. Krause, he told her: "Well, if you are sure it is a whole needle, it should come out, no matter what your condition is at the present time. You go back to your doctor. (Dr. Krause did not know who my doctor was.) Tell him that it should come out immediately, and should make immediate arrangements to take care of you" (R. 51, 52).

Upon plaintiff's return to defendant's office, he said: "Oh, if you are going to act that way about it, I can take it out right away," so he called the hospital on March 9, at about a quarter of twelve. Plaintiff arrived at hospital about a quarter of one, and defendant put plaintiff in charge of the nurse who prepared her for the operation. Defendant injected novocaine in plaintiff's side, and with assistance of Dr. McPeak, they laid plaintiff on an X-ray table. The operation began about one o'clock and ended about 2:20. Dr. McPeak stated: "You had better cut it about an inch more, Doctor," and turned to plaintiff saying: "It is much deeper than we thought" (R. 53). The pain during the operation was terrible, and plaintiff was crying. Dr. McPeak stated: "You are doing wonderful." Plaintiff could feel the doctor striking something hard inside her. It was a terrible ordeal. Plaintiff used handkerchief to remove perspiration flowing freely from defendant. He withdrew needle and exhibited it to plaintiff for about ten seconds. It was completely rusted and dripping (R. 54).

Defendant took plaintiff to Virginia to get plaintiff's mother. *Defendant complained because plaintiff had told her mother about the needle.* Because of

plaintiff's condition, defendant took her to his office, arriving there about ten minutes after three. Plaintiff's mother, and little boy came in about five o'clock and defendant wanted her to return to her home, but when plaintiff got up she nearly fainted, and defendant said: "Well, all right, we will send her back to the hospital" (R. 56). Plaintiff was then wheeled out of defendant's office and sent to hospital in a taxicab.

March 11 plaintiff was discharged by defendant from hospital, and was presented with bill for \$10.60, which she refused to pay. Plaintiff called to see defendant several times for light ray treatments.

March 16 plaintiff called to see defendant and they had conversation in regard to needle, defendant saying: "Now, of course, we know the needle was rusty, and my interne did not turn on the light when he brought you back from operating room. All rooms are kept dark when patients are brought back to the room. He did not turn on the light. Therefore, he couldn't see what he was doing (R. 57). Plaintiff said: "Wasn't that very careless." Defendant said: "Of course it was careless, but don't blame that poor boy at the hospital. If you are going to blame anyone, blame me. There is nothing that you can do about it. You can't do a thing about it" (R. 57, 58). Plaintiff continued to take treatments until first part of April. On one of these occasions, defendant gave plaintiff hypodermoclysis needle in question, which is tubular in form, hollow in center, about two inches in length, placing it in small piece of gauze (R. 58-59). Said needle was received in evidence (R. 58).

Plaintiff continued to complain of burning sensations in area of her right side (R. 58). Plaintiff took seven sun-ray treatments. Last time plaintiff saw defendant professionally was June 8, 1936, when he said: "No one can tell what kind of pain you are going through

except yourself. You are more susceptible to pain than other people. But come and see me and I will examine the place" (R. 58). For about three months plaintiff did not enjoy sleep. When she would try to sleep, she would feel like a sword going through her (R. 61). This sensation happened thirty or forty times a day. She went to defendant June 8, and he said he could kill nerves in that area by injecting alcohol. Thereafter, plaintiff consulted Dr. McPeak, who assisted in removing needle. He said her nerves had been cut during the removal operation (R. 61). Plaintiff consulted Dr. Francis Courtney and Dr. C. E. Halley.

She consulted Dr. Fifer August 20, who wrapped coil around area of plaintiff's breast, leaving it for forty minutes, just as hot as plaintiff could stand it. He gave her about eight treatments (R. 61, 62). She had slight relief. Plaintiff had no money to pay Dr. Fifer. She could not earn any, and was worried about his bill.

In January, 1937 (R. 63), plaintiff consulted Dr. McPeak at Emergency Hospital, where she had X-ray treatment, which caused plaintiff's right arm to become completely numb. In April, plaintiff consulted Dr. Fifer again, who told her that in cutting her nerves, some adhesions had grown around nerve ends. Dr. Fifer took her to operating room, administered gas, opened incision, made by removal of needle (R. 65), advised her that the cut was very deep and her nerves had been undermined. This was April 6, 1937. Plaintiff continued to take treatments from Dr. Fifer, who administered serum; it did not help plaintiff. He gave plaintiff treatment with machine, which gave only temporary relief. Dr. Fifer operated on plaintiff's side November 8, 1937, December 2, 1938, and January 3, 1939 (R. 67).

Photographs were taken of Dr. Fifer, with his per-

mission, while he operated on plaintiff, two of which the court admitted in evidence. These photographs showed scar about three inches in length in plaintiff's side and beneath her right breast. Plaintiff continued treatment under Dr. Fifer, consisting of injections of novocaine with needles about two inches long, causing plaintiff to suffer excruciating pain. Plaintiff continued to suffer great pain and numbness. Dr. Fifer ordered operations every two or three weeks, to kill all nerves in that area, so that plaintiff might eventually find relief. January 3, Dr. Fifer performed another operation on plaintiff, injecting needles in her side, when she became unconscious, causing her to have feeling of paralysis (R. 67).

Plaintiff began to study art when she was twelve years old (R. 70).

When she came to Washington, her average earnings were \$50 a week.

As a result of leaving needle in her side, she was affected great deal. She lost dexterity of her right arm (R. 71). It was hard for plaintiff to move her arm or raise it. When she drew a little while, her arm would ache very much so that she could not continue drawing. She had to give up sports requiring use of her arm. Plaintiff has been able to do very little work, either photography or art (R. 71). Plaintiff was given assignment to illustrate stories, instead of being able to do them in a few hours, it required ten days to work out simple illustrations because on many days she could not work; her arm was just too bad. She tried to do photographic work, but she could not carry her camera, a Graflex, weighing 6 3/4 pounds. Except on rare occasions, she could not take work. As a result of the accident, she lost nearly \$2,000 in earnings (R. 72).

Plaintiff's bill to Dr. Fifer was about \$75. At pres-

ent time, plaintiff has great deal of trouble in sleeping; suffers sharp pains going through her, causing her to awake during nights. There is a pull in her arm which goes to her neck. It feels as though her arm is being pulled out of socket when she uses it (R. 73).

Plaintiff's Testimony on Cross Examination.

On cross examination, plaintiff testified:

I am thirty-one years old (R. 73). I was married August 30, 1931, in Washington. After three months, my husband and I went to Spain. He was assistant to U. S. Trade Commissioner in Madrid. My child was born in Madrid March 20, 1933. I suffered considerable pain following his birth. Don't recall having nervous reaction from birth of child, but I was weak and my back hurt. I was not engaged in photographic or art work immediately following his birth, though I did some work in water-colors in Spain.

In July, 1933, my husband and I separated. In 1934, I instituted suit for divorce, in Las Vegas, Nevada (R. 76). From there I went to Chicago, later to Michigan, then to Asheville, N. C. During that time I suffered sword-like pain in lower part of center of my back (R. 75). At certain seasons, I had distress with my female organs (R. 78).

I returned to District of Columbia in June, 1935. I went to Asheville, N. C., and returned to Washington permanently.

In October, 1935, and during that summer, I suffered good deal with my back. In August, 1935, I decided to consult defendant. I think he took history of my case. I told him I had severe pains in my back and that I could scarcely walk.

Last time I saw my husband was in July, 1934, in Lordsburg, New Mexico. It is not a fact I told defendant that my husband had come to town and insisted on taking me on a date when he had raped me (R. 80). It is not a fact I told defendant my husband had lacerated and torn my female parts, causing hemorrhage. Nothing like that happened. I never had a hemorrhage (R. 80).

I asked defendant for physical examination. He told me my female parts needed surgical treatment. I did not discuss with defendant effects of a so-called rape. There was no one else present at consultation (R. 80). The nurse was probably there when doctor examined me (R. 81).

I am not familiar with medical terms. I asked Dr. Peckham meaning of "cholecystectomy." I got term from slip defendant gave me when I was admitted to hospital (R. 81). I studied anatomy when I attended Courtney Art School. I did not know meaning of retroversion, nor do I know what perineorrhaphy or trachelorrhaphy means (R. 81). At Courtney Art School (R. 82), a doctor instructed us in anatomy. We studied those things that would help us in drawing.

Defendant's examination of me required about five minutes. I agreed at that interview that an operation might be performed, but I did not make arrangements for it. Two doctors in Asheville, N. C., and one in Albuquerque, N. M., told me my female organs were out of place. I was suffering great deal of pain. I suppose I was quite nervous, but not highly nervous. Later, defendant and I conferred about my going to hospital. I went into finances mainly as I had very little money. Defendant explained operation had to be performed in hospital. Defendant said he operated at two hospitals. I selected Emergency (R. 85). I went to hospital September 2, after defendant had

made arrangement. I was operated September 3, 1935. On that occasion, I got two special nurses, directing hospital to furnish them. I had no difficulty with nurses during convalescent period.

I did not insist that defendant make arrangements to get me home. I was taken home in ambulance September 9 following operation September 3. My mother was not home when I arrived. Ambulance driver let me in apartment, carrying me upstairs and putting me to bed (R. 87). Defendant did not tell me I was not physically fit to go home. I was quite nervous.

Defendant said when he opened me he discovered stones in my gall bladder (R. 88). I had pains in shoulder blades and across back of neck. Defendant discharged me October 7, 1935 (R. 89). I called him about October 24 or 25, and he treated me until December, 1935. I was taking diathermy treatments, consisting of baking and massaging my back.

Ultimately, defendant told me my gall bladder had to be removed (R. 90). I contacted defendant January 17. My sister was with me, and said, "Well, about how long will she be in hospital, so I can figure on the bill?" Defendant replied: "Three or four days." My sister said, "Are you sure that is all it will take?" Defendant said, "Well, make it a week. That will be all right" (R. 90). I was not working and was financially pressed. I asked for cheaper semi-private room at hospital to keep expense down. He gave me a slip January 17, 1936, calling for my admission to hospital January 23.

When I arrived there, I made arrangements for admission agreeing to pay \$5 a day. I think first doctor who saw me after admission was Dr. Peckham, who took my history. I told him my difficulty. Dr. McCrombie, to my recollection, did not come in room (R. 94). Don't remember nurse who took care of me

that night. I had no knowledge that I was to have special nurse and did not ask hospital to furnish one. Miss Moatz came in room next morning. I did not know her. I saw her name on slip on dresser. I could see she was not student nurse. She told me defendant had asked her to come. I did not discharge her (R. 96). Miss Moatz prepared me for operation. She gave me hypodermic. At 8:25 I was given general anaesthetic. I went into unconsciousness. Next thing I remember was something extremely cold on my side. I was bandaged across abdomen with large bulky bandage. I did not put my hand on bandage, but up to my side (witness indicating where needle was broken off in her side). There was no bandage on my side, but pie-shaped cut about one-half inch each way (R. 98). It was moist. Do not remember feeling on other side of my breast. I remarked: "Hm, knife must have slipped" (R. 98). I was bandaged so I couldn't see where incision was. I couldn't feel it. It was about five inches long, possibly six. Nurse told me it was a quarter after three. I went to sleep. Saw defendant about seven, and said to him, "How is Miss McKittrick?" Defendant replied: "She is fine. She was wondering how you are." I replied, "I have splitting headache." Defendant said, "We'll get an ice-cap" (R. 101). I realized I could not remember where I lived. Didn't know where my baby was and I couldn't remember. I complained of pain in head. I did not complain of incision. Defendant made no attempt to examine my side. He was there only two or three minutes. Next night I asked Miss Moatz if I had a special nurse. My sister paid for nursing (R. 102). I made no complaint of nurses. I was sick following the operation and vomited. I was hurt all over. On 25th or 26th I remember Miss Brazill coming to nurse me. I was running fever during evening of February 3. I started to cry. Nurse slapped my arm telling me

to be quiet (R. 108). I had fever on February 3 and 5.

I was discharged February 10. Defendant said I could walk around, and for several weeks I could get up for a while each day. I do not believe I stayed up all day until long after needle was out. I had constant pain in my side. Next time I saw defendant, following Wednesday, I complained of pain in side. He told me to keep rubbing it with my thumb, by pressing hard in forward movement (R. 116). There was a black mark on my side, dark as a blackboard. I could do only little drawing while I was in bed, from time I was discharged from hospital February 10 until March 7.

Plaintiff identified picture drawn by her at odd times while reclining in bed, which was exhibited to jury.

A tube and rusty pin were introduced in evidence, which had been used to drain plaintiff's incision, resulting from gall bladder operation.

Plaintiff identified water color drawing she made after April 1, which took several days to make, which she made while lying down and sitting up (R. 123). Plaintiff had given these pictures to defendant; this was not after she had sued him.

In fall of 1935, she gave Dr. Courtney a picture of Rock Creek Park. Plaintiff had sold some pictures to defendant's nurse. Plaintiff had difficulty in drawing them. Plaintiff worked for Harris and Ewing about six weeks in November and December, 1936. She worked for Photo Supply Co., in summer of 1936, and Photo Craft Shop in summer of 1938.

Plaintiff fixed her earning capacity at \$50 per week, prior to marriage. Plaintiff kept books. Plaintiff worked for R. D. Wyly in July, 1929, until March,

1930; was paid \$30 per week, besides having six accounts of her own. Earnings, \$50 a week were her average, prior to accident. Plaintiff has some paintings she made in Spain. Plaintiff was earning more than \$50 a week after she quit Wyly's.

Plaintiff repeated her interview (R. 132) of March 7, with defendant, quoting defendant as saying: "*We had a little accident in hospital. My interne left a rusty needle in you. We will have to take it out before it either causes an infection or moves down to a danger zone. Come in the other room and I will show you what kind of needle it was.*" Showing the plaintiff the needle, defendant said, "*Now, that broke off right here at the shank. But don't tell anybody about it. You can tell your family you are going to a show some day and then come down here and we will take you down there and take it out.*" (R. 132). Plaintiff was positive it was March 7 that defendant told her that the needle had been broken off in her body. The needle was not removed that day, but it was on March 9. On March 7, she called on Dr. Krause, a friend, in the same building. She did not tell defendant that she had seen Dr. Krause, nor did she tell him on March 9 that another doctor said that the needle ought to come out immediately.

When plaintiff arrived at hospital on March 9, to have needle removed, she met Dr. McPeak, whom she did not know. Defendant told her to ask for him. Dr. McPeak and Dr. Peckham assisted in operation. It took nearly an hour for the doctors to remove the needle. It made a scar two and one-half inches in length (R. 142).

When photograph was taken of Dr. Fifer, operating on plaintiff, where needle was removed, it showed scar of 2 1/4 inches in length, from stitch to stitch.

When needle was removed by defendant it was rusty and dripping, completely rusted. When asked if it was any different from what it was now (at trial of this case) plaintiff said it didn't look like a bright and shiny metal at all. Plaintiff testified that defendant polished the needle before he gave it to her. The needle has not been exposed, but has been in gauze, in an envelope, since defendant gave it to her (R. 145). Defendant had the needle in his possession about three weeks before he gave it to plaintiff.

I still have pains in my chest and it is sensitive to touch.

Upon re-direct, plaintiff testified that it took her from Tuesday until Saturday to complete drawing of a chart she presented to defendant. It took her three or four days to prepare other picture which she gave him, but, ordinarily, if she were well, it would take her only about three hours to do the same amount of work (R. 151).

Continuing cross examination, with reference to her account books, she testified she put earnings on one side and cost of materials on the other, which showed small earnings at various times, with names, items and amounts, following operation; that same did not aggregate total of \$50 per week.

Upon re-direct, plaintiff testified as to payments made to Dr. Fifer and his secretary from medical services subsequent to operation, aggregating \$70.

Plaintiff introduced in evidence deposition of Dr. Henry L. Peckham, Jr. (R. 237-288), taken by stipulation of counsel for respective parties, on December 16, 1938, and, in substance, is as follows:

I am thirty-one years old, reside in Baltimore (R. 237). I have been out of District of Columbia for three or four years. I graduated from George Wash-

ington University in 1934, served one-year internship at Garfield Hospital; continued internship in Emergency Hospital in 1935 and 1936. I was interne at Emergency in January, February and March, 1936 (R. 138), when plaintiff was patient there.

I inspected hospital records today, being first time I had seen them since June, 1936. There were present defendant and Messrs. Christiansen, Offutt and Canfield, last three being attorneys for defendant and myself. I had no difficulty in seeing records, which were shown to me freely (R. 239). I spent about twenty minutes looking at them.

I recall operation on plaintiff. I assisted defendant (R. 239). I have not been in communication with defendant, but I have been with his attorney, Mr. Canfield. I was present on March 9, when needle was extracted from plaintiff's body by Dr. Smith.

I can't remember exact date when I was admitted to practice medicine, but it was before I left hospital in June, 1936. I do not remember if it was subsequent to operation or prior to it. I took examination to practice in two parts, as it was easier to pass. I do not have my certificate of admission with me. Nothing occurs to me by which I can fix date when I was admitted. I was interne at Emergency Hospital in January, February and March, 1936.

I was present when defendant removed plaintiff's gall bladder January 24, 1936, I assisted, other assistant being Dr. Christiansen. My assistance consisted of sponging, helping to clamp meters, holding hemostats while he tied knots, and holding retractors so that he could get good view of what he was doing (R. 243).

In file today, I observed chart of directions by defendant, Dr. Smith, surgeon, in charge of case, to give a hypodermoclysis to plaintiff. Pursuant to those direc-

tions I gave patient hypodermoclysis (R. 243), within a matter of minutes following gall bladder operation, after the patient had been removed to her private room from operating room. Patient had been given general anaesthetic for gall bladder operation. I recall she was unconscious at time I gave her the hypodermoclysis though I do not recall how long she remained under the effect of general anaesthetic (R. 244).

Continuing, witness testified: "Well, after wiping off skin with iodine, I placed needle through the skin into subcutaneous tissues alongside of chest, and in inserting needle on right side, upon moving needle over under skin slightly to be sure that needle was in proper position, the hub of needle snapped off, leaving about one-eighth inch of needle projecting from skin. When I tried to get hold of this end of needle, it slipped under skin before I could get hold of it and pull it out; so, thinking it might be possible to manoeuver needle in such way that the broken end might be made to come out through hole it went in, again I attempted to bring broken end of needle out by gently pressing on the skin. After a minute or so of this, I decided that it would be impossible to get it out that way, so I instructed the nurse to call in the resident physician, Doctor Mitrani. Dr. Mitrani happened to be on the floor at the time and he arrived at the room within a minute or two, after I sent the nurse for him. I explained to Dr. Mitrani the situation, and he asked the nurse to get him a hemostat, a scalpel and some iodine, and after disinfecting skin in the location, he made small incision about a half inch long with scalpel through skin. Then he inserted hemostat through opening made in skin and attempted to probe end of broken needle with hemostat. He attempted this for minute or two, and was unsuccessful in locating end of broken needle. He decided that it was no use to make further attempts and called defendant, Dr. Smith, to notify

him'' (R. 244-245). Dr. Smith's decision was to leave patient alone, temporarily. The needle that was broken off in plaintiff's body was about two inches in length, hollow in center, with sharp point at one end and evenly broken at the other (R. 246). Witness identified needle exhibited to him as the one which was broken off in plaintiff's body.

Witness further testified that in giving hypodermoclysis, the fluid is elevated in a bottle about three feet above patient, passes through rubber tube equipped with glass tips, through needle, then into subcutaneous tissues on either side of patient. Elevation causes pressure, making fluid flow into body (R. 246). I do not recall name of nurse, nor do I recall between what ribs needle was inserted. Needle was inserted up to hub of needle. I did actual insertion of needle into her body, but I do not recall whether her body absorbed solution or not. Needle was inserted parallel to length of the body, not upwards or downwards, but straight ahead, that is, parallel to long axis of body, but I have no recollection as to between what ribs insertion took place. After I inserted needle, I moved point of needle back and forth, so that I could get good idea of depth of point of needle (R. 249). I did this by touching hub of needle. I did not strike a rib, I went between ribs (R. 249). I went alongside of ribs. Point of needle was headed in direction of her head (R. 250). Immediately after inserting needle following my moving it backwards and forwards, it broke off. I made no preparation of patient for hypodermoclysis injection, by strapping her or confining her body so it would be immovable, as we never do that (R. 250), unless patient is violent. There is no reason to do it if patient is under general anaesthetic any more than for gall bladder operation, as patient is completely unconscious (R. 251). That was condition of patient at this time. I swabbed her side with iodine prior to operation.

Solution which I injected into her body was manufactured one. It was given to replace body fluids lost in operation. Dr. Smith (defendant) personally told me to give hypodermoclysis to plaintiff (R. 251).

Witness further testified:

"Q. What, Doctor, if any inspection did you make of this needle prior to inserting it? A. I just looked at them.

"Q. They appeared all right? A. They appeared all right.

"Q. What, if any, inspection did you make of the hub after it was broken? A. I looked at the hub pretty closely because of the ease with which it had broken off and it appeared to me that the inside was rusty.

"Q. Was it considerably rusted? A. No, not considerably.

"Q. How much? A. Well, it was a little dirty looking; it appeared a little blackish.

"Q. Were you present when the needle was removed by Dr. Smith? A. Yes.

"Q. What was the condition of the needle when it was removed—you saw it then? A. No, I didn't.

"Q. You did not see it? A. No.

"Q. Did you inspect the end of the needle—the sharp point of the needle before you inserted it, Doctor? A. I don't recall. Generally I do inspect the point.

"Q. I didn't ask you that, I asked whether you inspected this particular needle on that occasion? A. I don't recall.

"Q. I asked you a moment ago, Doctor, whether or not you were present when the needle was removed, and you said you were. I ask you what part did you play in the extraction of the needle on March 9? A. I didn't play any part in the extraction of the needle. I was an on-looker.

"Q. Did you not operate the lights? A. I may have operated the lights—the room lights.

"Q. Do you recall whether or not you operated the lights? A. I don't recall whether or not I did.

"Q. You were an onlooker? A. I was an onlooker.

"Q. And as an onlooker, you didn't see the needle when it was removed? A. No, I did not.

"Q. Didn't you have some curiosity, Doctor, about seeing a needle which you had broken off on January 24? A. I didn't ask the doctor to see it" (R. 252, 253).

The needle was shown to witness and he was asked to inspect it and to state whether or not the point was rusty and he answered: "The needle does appear rusty on the point at the present time."

Witness admitted that he did not know whether the needle was sterile at the time it was inserted in the plaintiff's body.

The following questions were asked and answers given (R. 254):

"Q. Do you know, professionally, and if so state the possible effects on the human body of having inserted a rusty needle, we will say for example, at 11:30 on January 24, 1936, and remaining in the body of the patient from that date until March 9, 1936—until about two o'clock on March 9, 1936?

"*Mr. Canfield*: We object to answer until counsel narrows his question to that part of the body where the needle was inserted in this particular case, namely, the right axilla.

"*Mr. Wood*: I will amend my question, if I may, to include the part objected to by counsel, which would be at a point to the rear of the right breast.

"A. I would prefer to say I am not an expert.

"Q. Then you would not know what the effect would be of the insertion of a rusty needle? A. No.

"Q. Will you state whether or not the needle you inserted in her body on that date was defective? A. It appeared to be."

Upon cross, witness testified, in substance:

I took national board examinations in three parts and ultimately succeeded in passing. Thereafter, I passed examinations in the District of Columbia. I applied to Garfield Hospital for position as interne, and likewise at Emergency Hospital. I did not consult defendant and did not have his endorsement. I did not know Dr. Smith prior to time I became interne at Garfield. When I became interne at Emergency, I reported to Dr. Mitrani, chief resident physician, for assignment. Either he or some other doctor gave me assignments, which are changed periodically by chief resident. In 1936, I was assigned to surgical service at Emergency, requiring attendance at operations performed in hospital. I took plaintiff's case history January 23, 1936."

Witness was handed certain papers by counsel for defendant, and following occurred:

"Mr. Wood: May I ask counsel * * * what is the purpose of this record, and what is the record he now shows?

"Mr. Canfield: The record is the original record from Emergency Hospital. The purpose is cross examination of the witness.

"Mr. Wood: May I ask counsel where he obtained this?

"Mr. Canfield: From the hospital.

"Mr. Wood: Was it given to you voluntarily?

"Mr. Canfield: Certainly, Dr. Smith got it.

"Mr. Wood: They refused to show the plaintiff and her counsel the record yesterday, and I, in the presence of Mr. Sandidge, the superintendent of the hospital, called Mr. Canfield, as counsel knew then that Mr. Canfield would not object to his seeing the record. Failing to reach Mr. Canfield and failing to get the consent of the superintendent to call Dr. Smith, who gave his consent that the records now produced might be exhibited to the counsel, and plaintiff, only in the presence of Blundon, or another representative of the hospital, and counsel was not per-

mitted to have photostats made of the papers there seen in the hospital.

"Mr. Canfield: I have no permission to authorize plaintiff's counsel to make photostats, but while I have the records here, I make no objections to the same being studied and examined by plaintiff's counsel, so far as he cares to.

"Mr. Wood: And you will leave them in my possession?

"Mr. Canfield: I have no authority to do that; I am charged to bring them back" (R. 258, 259).

Witness, Dr. Peckham, continuing, testified:

Record was made in handwriting of witness. Information contained therein was given by patient. *After operation, Dr. Smith spoke to witness in hall and asked him to give patient a hypodermoclysis. Dr. Smith ordered that (R. 260). That was customary after an operation. Dr. Smith knew I was interne at hospital and what my duties were. It was part of my duty to carry out instructions of operating surgeon.*

I am not in employ of defendant, and I have never been, nor have I received compensation from him, nor did I consult him when I became interne. I did not appear before Dr. Smith for examination. Nurse brought apparatus for injection into room. It was part of Emergency Hospital equipment. It was ready for injection when nurse brought it in room.

It was wrapped in cloth to keep it sterile, in accordance with the practice in the hospital. I got no part of apparatus from Dr. Smith. So far as I know, all the equipment belonged to Emergency Hospital. After needle broke off, I tried to recover it and failed. I then called chief resident of hospital, who was my superior. When Dr. Mitrani came into room, he called for a scalpel and a hemostat and began to probe for needle. He incised plaintiff's body, but did not cut into pectoral muscle. The hemostat did not locate needle. I can't recall what Dr. Smith's reasons were for not wanting patient further disturbed. I think

patient was unconscious from general anaesthetic during all of this time. When needle was removed on March 9, Dr. Smith took it out. Dr. McPeak operated fluoroscope. Dr. McPeak is X-ray and fluoroscopic technician. In going through chart, witness identified evidence of infection on February 6, 1936, from abdominal wound. Witness traced patient's fever as follows: Following operation, on subsequent day, patient's temperature rose from 98.8 to practically normal, then to 100.4.

Q. That is normal? A. Yes. Then fell on 26th to 99.4; then fell to 98.6 in morning, rose in afternoon to 99.4. On the 27, in morning, it fell to 98.4, rising in afternoon to 100.0. Thereafter, it remained practically normal until the 29, on afternoon of which it rose to 101.6 at 9:00 P. M. The temperature remained practically normal following this until February 1, on afternoon of which temperature rose to 100. On second, temperature rose to 101.6 and during this day and following day, temperature fluctuated around 101 degrees going as low as 99.4 at 12 A. M. on third to 102.4 at 4 P. M. on third (R. 270, 271).

Q. Third of what? A. Third of February. Going back to 100.2 at 4:00 A. M. on fourth, rising to 101.4 at 8:00 o'clock same day, and at noon of same day falling to practically normal. Temperature remained practically normal until 8:00 on 5th following when it rose to 102 degrees at noon and to 102.6 degrees at 8:00 P. M. and then fell off to 99.6 at 12:00 P. M. night of the fifth. Temperature on sixth of February was 99.6 early in morning and rose and fell twice that day, going as high as 101.2. On seventh, her temperature fell to sub-normal regions, 97 degrees, and from this time on temperature was practically normal until her discharge on tenth (R. 271).

Witness was handed another group of papers which indicated that on March 9 patient had a normal temperature.

Witness testified:

"The needle is a steel one and inserted in the soft tissues of the body, it appeared to be defective, and it is my opinion that it broke off because it was defective." The needle broke off be-

cause of a defect that the witness did not see or know about and did not observe (R. 275, 276).

Upon re-direct, witness could not remember exactly when he was admitted to practice medicine. He never practiced medicine or surgery on his own account.

Dr. Smith, on leaving the operating room, instructed witness to give patient saline solution by means of hypodermoclysis needle (R. 277), and it was administered to plaintiff not as a result of any direction on the part of Dr. Mitrani, resident physician (R. 278).

My duties were to carry out instructions of individual doctors in each case, as well as general directions of the superintendent. It was with respect to the particular directions of Dr. Smith alone (R. 278) that I gave the hypodermoclysis (R.). My general duties carried me to many physicians in various types of cases.

In individual cases, witness acted upon particular directions of doctor in charge of that case and he would not have administered hypodermoclysis to patient had it not been ordered by Dr. Smith (R. 278). Witness made notation on patient's hospital record January 31, 1936 as follows: "Patient doing fine. Temperature normal. Abdomen soft. On light diet. Needle broken off when given sub-que; still in breast—Peckham" (R. 279).

Equipment used by defendant in gall bladder operation was usual hospital equipment, as it was customary for a doctor, having private patients, to use hospital equipment. Witness never showed the patient the chart. Witness called Dr. Mitrani because emergency situation developed in absence of doctor in charge of case. Incising means cutting into patient's body. Dr. Mitrani cut through skin about one-half inch deep. It is a fact that sharp pointed instrument in some cases has tendency to circulate or move around in human

body, which is known to medical world, but witness would not say it is known to lay world (R. 282). Witness could not recall whether incision made by Dr. Mitrani was dressed, because relayed instructions from defendant were to leave it alone.

Witness identified notation on chart: "10:45. From operating room unconscious; pulse 90; respiration 24; glucose 5% 8 ounces" (R. 285).

Following occurred:

"Q. I show you an entry on the following page—11:45 sub-Q by Dr. Peckham. Will you state whether or not that is about the time you gave the sub-Q? A. It was somewhere around 11:00 or 11:30. I couldn't state it was 11:45.

"Q. That is the entry, however, which you see on this chart? A. Yes.

"Q. Doctor, state this. I observe there is no notation on here you broke off the needle. Will you state why that entry was not made? A. I couldn't answer you why it was not made.

"Q. Did Dr. Mitrani tell you not to make the entry? A. No.

"Mr. Canfield: Counsel is reading from the nurse's chart, and the witness has already testified the doctors don't sign the nurses' chart.

"Q. Can you state why that entry does not appear on that? A. No; the nurse didn't record it.

"Q. Do you know why she didn't record it? A. No.

"Q. Are you sure about that? A. Yes.

"Q. Don't you think it is an extraordinary thing, Doctor, that such an accident as that was not entered on her daily record? A. Yes, it should be on there.

"Q. Did you tell the nurse to enter it? A. No.

"Q. Why didn't you? A. I never tell the nurse what to enter on the chart.

"Q. Why? A. That is her business.

"Q. Do you know whether Dr. Smith told her not to? A. No.

“Q. Or whether Dr. Mitrani told her not to?
A. No.

“Q. But you did state in your letter to me of January 20, that in a year and a half internship, nothing like this had ever happened before? A. That is true.

“Q. And it does seem strange to you, does it not, that such an extraordinary thing was not entered on this record? A. Yes” (R. 285, 286).

Upon re-cross, witness receives \$10 month as interne, with room, board and laundry paid by hospital. It was Dr. Mitrani's duty to make dressing of incision (R. 287).

Upon re-direct, witness testified, that once he was in room with Dr. Smith he was there to carry out Dr. Smith's orders, rather than those of Dr. Mitrani. If Dr. Smith had ordered him out of room, he would have gone (R. 288).

Plaintiff produced as a witness Dr. Carson L. Fifer, who testified, in substance: My name is Carson L. Fifer of Alexandria, Va. I am a surgeon, having graduated from University of Virginia in 1928. I am connected with Alexandria Hospital. I know plaintiff. She has been my patient since August 20, 1936. I have treated her since then. She is still under my professional care. I performed two minor operations on her, excising small scar over her right breast. It was near fifth rib in mid-axillary. I recognize photographs handed to me, and the pictures of me, and that looks like Miss Browning. Pictures show I was injecting novocaine at time. I opened scar because patient complained she had pain in her side. I thought she had a painful scar. I took scar out first and that didn't relieve pain. After that, I made four injections of novocaine underneath skin to see if I could relieve her pain. I thought her pain came from scar. I thought nerves were tied up in scar (R. 178). I think she came to see me about twelve times. I gave her

different kinds of treatment. I gave her diathermy heat and short wave treatments, to relieve pain. I took her case in charge and considered myself competent to treat her (R. 181). I think I located seat of her trouble. I do not think my treatment of her did much good.

The following ensued:

"Q. In other words, you think your treatment helped her or hurt her?

"A. Well, I don't think it did her much good.

"Q. Do you think it is curable or incurable?

"A. I think it is curable.

"Q. How can it be cured, Doctor?

"A. Well, I would rather not say.

"Q. What?

"A. I would rather not say.

"Q. Well, I would rather have you say, if you will. You don't feel hostile toward her, do you?

"A. I believe that if she got her mind off it, she would be a lot better off.

"Q. I say, you don't feel hostile toward your patient?

"A. No, indeed. No, indeed. I arrived at the conclusion that if she got her mind off it, I believe she would feel better.

"Q. Doctor, you don't resent having to come here under subpoena, do you?

"A. To what?

"Q. You don't feel resentful that we had to subpoena you?

"A. No doctor ever likes to attend court.

"Q. You didn't want to come here, did you?

"A. To be frank with you, I did not.

"Q. You did not?

"A. No.

"Q. How much has she paid you for professional services?

"A. My secretary is off, and I think this record here shows that she has probably paid me—all I see here is seven dollars" (R. 181, 182).

I gave plaintiff treatments of saline, and sometimes I would inject alcohol to relieve pain. Some injections took an hour and maybe not so long.

When asked whether he would give treatments for psychological treatments, he answered: "You have to take patient's word, when a patient tells you she has pain" (R. 183).

When witness was shown his secretary's record, he would not identify it.

Because of scar on right side of her body, underneath breast, she was given diathermy treatments by Dr. Fifer, resulting from case history given to witness by plaintiff. Then, scar was removed, adhesions separated with skin and entire area undermined.

Plaintiff produced Jack LeNord, who testified, in substance:

I have known plaintiff since October, 1935. I was a friend of her family. I visited her house. Had opportunity to observe her manifestations of pain. I drove her home from hospital. She suffered great pain in her side, and was taking a sodium amytal. I purchased this for her several times from drug store. I frequently visited her house in 1936. During that time she suffered considerable pain" (R. 202-204).

Upon cross, witness said he did not seem to notice much improvement last time he saw her from first time he saw her in 1936. He saw her three or four times in 1937. She didn't seem to be very much improved.

Plaintiff produced Miss Florence Browning, who testified, in substance: "I am a sister of Mrs. Hohenthal. We reside at same address, 2713 N. Franklin Road, Arlington, Va. I have lived with plaintiff since 1935. Since her operation, January 24, 1936, I have seen her daily. She has complained of pain, especially in her arm. I have slept on same floor with her in a bungalow ever since that operation. I have been awakened at nights by her moaning, crying with pain (R. 206). Frequently, I walked into her room. She gave much evidence of pain. Plaintiff de-

scribed her pain like hot sword being thrust in her side. Though it has not been acute at all times, it has been frequent. During plaintiff's disability, I have had to support her. She has not been able to carry on continuous work, although she has tried to. I am employed in Department of Agriculture. My twin sister and I took care of hospital bills (R. 207).

Upon cross, witness testified she paid hospital bill in 1935, and gave plaintiff money following operation in January, 1936. **Plaintiff has been in pretty bad shape since the needle was removed.** She has been sick and to present time she has not been able to hold permanent job. She was capable of doing clever work as an artist, but her work is not as good as it formerly was (R.). Plaintiff worked several years for Dulin & Martin, and at Hecht Company, as artist. I do not know her exact earnings. I think she earned more than \$50 week when she worked at Graystone Apartments, in 1929, better part of 1930, and part of 1931.

Mrs. Louise W. Browning testified:

I am mother of plaintiff. Am sixty years old. I have been a silhouette artist for last ten years. I recall my daughter going to hospital in January, 1936. I visited her practically every day. She had fever and was in great distress following operation. *There was a dark spot below arm pit on her right side.* She came home February 10, in ambulance. My daughter has always been very brave. She had a great deal of fortitude. She tried to interest herself in everything. She complained of great deal of pain in her side, where sub-Q injection had been done (R. 218).

March 8, 1936, I first learned that needle had been broken off in her side. She went to hospital following day. She was terribly sick from operation, resulting from removal of needle. Her nerves were torn and shattered. She had been through frightful ordeal, and complained of being miserable. Perhaps it was more at night

than during day, for at night she rarely slept (R.). She wasn't able to do business following operation. At times she would go into spasms, the pain being underneath her right arm pit.

Mrs. Florence Harris testified:

While I am not in business, I am engaged in photographic work. I know plaintiff. Met her January, 1937, when plaintiff gave lecture on Spain, showing pictures of Spain. Since then, I have met her very frequently. I accompanied her to Dr. Fifer's office, at Alexandria hospital, in December, 1938, when he gave me permission to observe an operation on her. When I first met plaintiff, when she gave her lecture, I observed she was under strain. I invited her to luncheon since, and I have been interested in her work. She seemed to be suffering very much, and was unable to concentrate. *These manifestations of pain from her right side have continued unabated since 1937* (R. 223).

Upon cross, witness testified:

I live at 1316 Hamilton Street, N. W. I am amateur photographer. My husband and I have been interested in the subject for thirteen years. When I took pictures of her operation nothing was said about law suit. I used Graflex camera. From time of plaintiff's lecture, I saw plaintiff once a month and possibly oftener. Plaintiff seemed somewhat drawn, although her weight has not changed. Her physical condition seems worse.

Counsel announced plaintiff's case in chief closed. Defendant moved for a directed verdict, which the court granted.

The following occurred (R. 224, 235, 236):

"The Court: I will sustain the motion for a directed verdict.

"Mr. David: If your honor please, I think under the new rules exceptions have been abolished.

"The Court: The matter of taking exceptions to the action of the court has been abolished.

"Mr. David: I want to reserve the rights of the plaintiff as to the ruling of court.

"The Court: You had better note an exception.

"Mr. David: I note an exception to your Honor's ruling, and I want to state the grounds of the exception.

"The Court: I don't think you need to state them. The law does not require you to state them. The law does not permit you to state the grounds at this time.

"Mr. David: Your Honor will allow me an exception to that ruling.

"The Court: Yes, exception to my refusal.

"Mr. David: I would like to have an exception to your refusal to allow me to state my grounds.

"The Court: Very well.

"Mr. David: I want to preserve all the rights of the plaintiff as to the ruling of the court before the direction of the court to the jury.

"The Court (addressing the jury): Members of the jury, the declaration stating the plaintiff's cause of action is in two counts. In the first count she charged the defendant with liability for the negligent act of the interne. Now as to that ground I find no substantive evidence in the case showing that the interne was in the employ of Dr. Smith. Therefore, as to that ground you will return a verdict for the defendant. The second count charges Dr. Smith the defendant with improperly treating the patient after this needle had been left in her body. But there is no evidence in the case that the treatment was not in accordance with the standard of physicians practicing here in the District. Therefore, I direct you to return a verdict for the defendant on both counts.

"Mr. David: After your Honor has made your ruling, may I renew my exception before the verdict is actually taken, on behalf of the plaintiff.

"The Court: Yes.

"Mr. David: And I also want an exception to your Honor's refusal to let me state my grounds.

"The Court: I assume that the grounds of your exception were those made in argument yesterday.

"Mr. David: Excepting this, that I want to make this point: That we contend, first, that the doctrine of *res ipsa loquitur* applies and under the new rules of civil procedure.

"The Court: I don't want any argument. Just state the grounds.

"Mr. David: The first is that the doctrine of *res ipsa loquitur* applies. And also the plaintiff contends that the negligence alleged in the declaration, which is shown by the evidence in the case is sufficient to send this case to the jury; and that the ruling of the Court not to let it go to the jury is equal to a finding on the facts by the Court when we are entitled to a finding by the jury under the seventh amendment to the Constitution of the United States.

"The Court: We will take the verdict.

"The Clerk: Gentlemen of the jury, by direction of the Court you are to return a verdict for the defendant on both counts of the declaration. Is that your verdict?

"The Jury: Yes.

"Mr. David: May my exception apply to the entry of the judgment.

"The Court: The exception is the ruling.

"Mr. David: I want the record to show that I note an exception to the judgment being entered.

"The Court: I don't know what the record will show at all. We have no formal record in the case except the pleadings and the entries on the minute books.

"Mr. David: This thing of entering a judgment forthwith is all new to me.

"The Court: You may except, of course, to any extent that you want; but that exception will not be entered on the minute books.

"Mr. David: But just so the reporter gets it. I do note an exception to the entry of the judgment for the defendant.

"The Court: Very well."

Statement of Points.

The Trial Court erred:

1. In instructing jury, on motion of defendant, at conclusion of plaintiff's evidence in chief, to render verdict for defendant, and in entering judgment on such verdict.

2. In holding that plaintiff could not recover on either count of her declaration.

3. In holding that neither as matter of law or fact was Dr. Henry L. Peckham, Jr., interne at Emergency Hospital, the agent of defendant, in administering, at the direction and order of defendant, hypodermoclysis to plaintiff, immediately following surgical operation performed by defendant upon plaintiff, on, to wit: January 24, 1936.

4. In not submitting to jury the question whether or not Dr. Henry L. Peckham, Jr., was the agent of defendant when he obeyed order and direction of defendant in administering hypodermoclysis to plaintiff.

5. In deciding that defendant was not guilty of actionable negligence in ordering, directing and permitting the broken needle to remain fastened in plaintiff's body from to wit: January 24, 1936, until to wit: March 9, 1936, whereas the Trial Court should have submitted that question to the jury.

6. In refusing to hold that the doctrine of *res ipsa loquitur* was applicable.

7. In not holding that defendant was required to offer evidence, if any he could, explaining satisfactorily his negligence which produced directly and proximately injuries sustained by plaintiff as disclosed by plaintiff's evidence.

8. In holding that plaintiff failed to make out a prima facie case.

9. The peremptory instruction of the Court to the jury to find verdict for defendant denied plaintiff right of trial by jury, in violation of Seventh Amendment to the Constitution of the United States.

Summary of Argument.

Assignment of errors involved the following:

POINT I.

Plaintiff was entitled to recover on each count of her declaration.

POINT II.

(a) Dr. Henry L. Peckham, Jr., the interne at Emergency Hospital, was, either as matter of law or fact, the agent of defendant, when said interne, at the direction and order of defendant, administered the hypodermoclysis to plaintiff immediately following the surgical operation performed upon plaintiff by defendant on, to wit: January 24, 1936:

(b) The question of the agency of Dr. Peckham, the interne, should have been submitted to the jury.

POINT III.

Plaintiff's evidence disclosed actionable negligence of defendant, and also of his agent, Dr. Peckham, the interne, entitling plaintiff to have her case submitted to the jury.

POINT IV.

Doctrine of *res ipsa loquitur* is applicable in this case.

POINT V.

The peremptory instruction of Trial Court directing jury to find for defendant was a denial of right of trial by jury, and in violation of the Seventh Amendment to the Constitution of the United States.

ARGUMENT.

POINT I.

Plaintiff was entitled to recover on each count of her declaration.

The first count charges defendant with liability for the negligent act of his agent, the interne, Dr. Henry L. Peckham, Jr., and the second count charges that defendant, the attending surgeon and physician of plaintiff, with improperly treating plaintiff after the broken needle had been left embedded in plaintiff's body.

No point was or could be made as to either count of the declaration from the standpoint of pleading, either by the trial court, or by defendant's counsel. The defendant filed pleas to the declaration and the case was at issue. Defendant filed an additional plea (R. 14) about the time of the trial, in which he asserted that the needle, used by the interne, Dr. Peckham, who administered to plaintiff the post-operative treatment for the defendant, and at his direction, *was latently defective, and that such latent defect caused the needle to break off into the body of the plaintiff.*

It should be remarked that in one of the previous pleas of defendant he claimed that there was no defect in the needle that might cause the plaintiff pain or difficulty (R. 14). Nevertheless, the trial court decided, improperly, we submit, that no substantive evidence was offered by plaintiff sufficient to be submitted to the jury on either count of plaintiff's declaration (R. 234-236).

The evidence, which we believe abundantly supports each count of the declaration, will be hereinafter referred to under Point III of this brief.

POINT II.

(a) Dr. Henry L. Peckham, Jr., interne at Emergency Hospital, was, either as a matter of law or fact, agent of defendant when said interne, at the direction and order of defendant, administered the hypodermoclysis to plaintiff immediately following the surgical operation performed upon plaintiff by defendant on, to wit: January 24, 1936.

The settled principle involved is that where one person puts his servant at the disposal and under the control of another for the performance of a particular service for the latter, the servant, in respect of his acts in that service, is to be dealt with as the servant of the latter and not of the former. Servants who are employed and paid by one person may, nevertheless, be *ad hoc* the servants of another in a particular transaction, and that too, where their general employer is interested in the work.

Denton v. Yazoo & M. V. R. Co., et al., 284 U. S. 305, re-affirming *Standard Oil Co. v. Anderson*, 212 U. S. 215, 220-225.

Linstead v. Ches. & Ohio Ry., 276 U. S. 28, 35, 36.

Messina v. Societe etc. Hospital (La. App.), 170 So. 801, 804, re-affirming *Foye v. St. Francis Sanitarium*, 2 La. App. 305.

Wyllie v. Palmer, 137 N. Y. 248, 19 L. R. A. 285, 33 N. E. 381, cited approvingly in *Sherwood v. Warner*, 27 App. D. C. 64, 66.

Phelps v. Boone, 62 App. D. C. 308, 67 F. (2d) 274.

Aderhold v. Bishop, 94 Okla. 203, 221 P. 752.

Gleason v. Salt Lake City (Utah), 74 P. (2d) 1225, 1230, 60 A. L. R. 137, in which the Court quotes approvingly the rule stated in *Aderhold v. Bishop* (94 Okla. 203) *supra*, as follows:

“A general master may loan the service of his employee to another for a specific purpose and for a short period of time, in which case the individual to whom such general servants are let is the master, and responsible for their negligent acts so long as he exercises actual supervision over them.”

In *Phelps v. Boone* (62 App. Cas. D. C. 308, 67 F. [2d] 274), *supra*, a Navy officer assigned to duty as White House physician, whom Navy Department provided with an automobile, and enlisted man as chauffeur, was held liable for chauffeur's negligence in driving officer back to District of Columbia after visit outside the District for purely private purpose. This court held that the test for determining liability for negligent act of servant is *right or power of person charged to control servant in performance of act causing injury*.

The court said (p. 309):

“It cannot be doubted, we think, that when defendant in error ordered the driver of the car to meet him at the White House and drive him thence to his own home and thence with his wife and guests to Baltimore, he intended to and did exercise the power of control, and it is beside the case, as we view it, to consider whether orders so given were lawful or otherwise. De-

fendant in error assumed the right to use and control the car and driver for a private purpose. He thereby assumed responsibility for the consequences of such use and control, and one such responsibility was to respond personally for an injury occurring to a third person resulting through the negligence of the driver."

The undisputed testimony in the instant case is that the Emergency Hospital put its employee and interne, Dr. Peckham, at the disposal and under absolute control of defendant, Dr. Smith, for the performance of a particular service for the latter, and it follows that the interne, in respect of his act, in that service, namely, the administration of the hypodermoclysis to plaintiff, patient of defendant, Dr. Smith, is to be dealt with as the servant or agent of Dr. Smith. *Denton v. Yazoo & M. V. R. Co., et al.*, 284 U. S. 305, 308, *supra*. In that case, Denton, U. S. railway postal clerk, sustained an injury due to alleged negligence of one Hunter, porter in general service of the two defendant railroad companies. Hunter was hired and paid by defendant Illinois Central Railroad Company, and who, at time of the injury, was loading U. S. mail into a mail car, under direction of a U. S. postal transfer clerk. Denton sued both railroad companies and Hunter, joining the railroad companies upon the theory that, in performing work of loading mail Hunter was their servant. Plaintiff obtained verdict and judgment against all defendants. The judgment, as to the railroad companies, was reversed by the Supreme Court of Mississippi on the ground *that what Hunter was doing at the time of his alleged negligent act was not for them, but for the United States*.

A federal statute provides that railroad companies are required to transport mail "in the manner, under the conditions, and with the service prescribed by the Postmaster-General." One of his regulations provides that the railroads shall furnish the men necessary to

handle mail and to load same into mail cars under direction of a transfer clerk, a federal employee.

The Supreme Court, at page 308, says:

“Whether the railroad companies may be held liable for Hunter’s act depends not upon the fact that he was their servant generally, *but upon whether the work which he was doing at the time was their work or that of another, a question determined, usually at least, by ascertaining under whose authority and command the work was being done.* When one person puts his servant at the disposal and under the control of another for the performance of a particular service for the latter, the servant, in respect of his acts in that service, is to be dealt with as the servant of the latter and not of the former. This rule is elementary and finds support in a large number of decisions, a few only of which need be cited.” (Italics supplied.)

In *Messina v. Societe, etc., Hospital* (La. App.), 170 So. 801, 804 (1936), *supra*, following *Foye v. St. Francis Sanitarium*, 2 La. App. 305 (a remarkably simliar case), the court held that:

“Externe at hospital who administered hypodermotoclysis at request of patient’s physician held ‘employee’ of physician and not of hospital, for purpose of administering such treatment even though at time treatment was given physician was not present, and hence hospital was not liable for negligence of externe in administering treatment.”

See concurring opinion of Judge Janvier at pages 806, 808, following *Aderhold v. Bishop* (94 Okla. 203, 221 P. 752), *supra*, and the concurring opinion of Judge McCaleb, at page 809.

Truck driver loaned by general master, subject to exclusive control and direction of special master, held employee of special master (*Burns v. Jackson*, 53 Cal. App. 345, 200 P. 80; *Burns v. Jackson*, 59 Cal. App.

662, 211 P. 821); *Devaney v. Lawler Corp.*, 101 Mont. 579, 56 P. (2d) 746.

In *Emerson v. Chapman*, 138 Okl. 170, 280 P. 820, where nurses under immediate supervision and control of operating physician, they are his servants during the operating and while under his supervision.

In *Schloendorff v. Society of N. Y. Hospital*, 211 N. Y. 125, 105 N. E. 92, 52 L. R. A. (N. S.) 550, held that operating physician was not the servant of the hospital, and the court said that a nurse acting for an operating physician was under his supervision, and not a servant of the hospital.

See also, to same effect, *Davis v. Potter*, 51 Idaho 81, 2 P. (2d) 318, and *Norfolk & W. Ry. Co. v. Hall*, 57 F. (2d) 1004, C. C. A.

A driver of horse and wagon of express company, but doing work for electric company under their direction and control, held employee of electric company (*Puhlman v. Excelsior Express & Standard Cab Co.*, 259 Pa. 393, 103 A. 218, L. R. A. [1918] E. 118).

In 48 C. J. 1137, the author says that a physician is responsible for an injury done to a patient through want to proper skill and care in his assistant, citing, among other cases, *Saucier v. Ross*, 112 Miss. 306, 73 S. W. 49, holding that where a physician performs an operation at a hospital, and other physicians act under his direction, it is no defense for negligently leaving a drainage tube in patient's body that it may have been left by another physician. Surgeon and assistant are jointly and individually liable for unskillful or negligent services of the assistant. *Spears v. McKinnon*, 168 Ark. 357, 270 S. W. 524.

Agreement regarding kind of anaesthetic to be used, made with patient by an assistant charged with duty of administering anaesthetic, is binding on physician. *Bishop v. Shurly*, 237 Mich. 76, 211 N. W. 75.

Where one physician retains complete control over the other, leaving no discretion, but only manual administration of prescribed treatment, and renouncing no part of his functions as sole physician in case, relation of principal and agent exists, making him liable for negligent treatment of patient by the other physician. *Noren v. American School of Osteopathy* (Mo. A.), 2 S. W. (2d) 215, 298 S. W. 1061. Same rule is applied to dentist employee. *Ragin v. Zimmerman* (Cal.), 276 P. 107; *McDonald v. Dr. McKnight, Inc.*, 248 Mass. 43, 142 N. E. 825.

A physician does not delegate or renounce function as sole physician in case where he authorizes his employee to perform mere physical administration of prescribed treatment, in his absence, leaving nothing to discretion; the patient in accepting treatment from employee relies on physician's implied assurance that he may safely do so, and not on employee's skill or discretion. *Mullins v. DuVall*, 25 Ga. 690, 104 S. E. 513.

In *Linnehan v. Rollins*, 137 Mass. 125, the court said "the absolute test is not the exercise of power of control, but the right to exercise power of control." Cited approvingly in *Baldwin v. Abraham*, 57 App. Div. 67, 74.

We contend that, under the evidence in the instant case, the conclusion is inescapable that the interne, according to his own testimony, when he administered the hypodermoclysis to plaintiff, was under the authority and command of the defendant, the operating surgeon. The interne obeyed the defendant's orders, and not those of the resident physician at Emergency Hospital, in an individual surgical case.

The interne, Dr. Peckham, testified that after the operation on plaintiff, the defendant spoke to him in the hall and asked him to give patient (the plaintiff) a hypodermocylsis; that the defendant ordered that (R. 260), which was customary after an operation; that

defendant (Dr. Smith) knew that he (Dr. Peckham) was an interne at Emergency Hospital and what his duties were; *that it was a part of his duties to carry out instructions of the operating surgeon.*

Upon re-direct, *Dr. Peckham, the interne, testified that defendant (Dr. Smith), on leaving the operating room, instructed witness (Dr. Peckham) to give plaintiff a saline solution by means of hypodermoclysis needle (R. 277). Dr. Peckham further testified that it was administered by him not as a result of any direction on the part of Dr. Mitrani, the resident physician of Emergency Hospital (R. 278). He also testified that his duties as an interne were to carry out instructions of individual doctors in each case, as well as general directions of the superintendent; that it was with respect to the particular directions of defendant (Dr. Smith) alone (R. 278) that he gave the hypodermoclysis to plaintiff; that his general duties carried him to many physicians in various types of cases; that in individual cases he (the interne) acted upon the particular directions of the doctor in charge of that case and he would not have administered the hypodermoclysis to plaintiff had it not been ordered by Dr. Smith (defendant) (R. 278).*

Upon re-direct, *the interne (Dr. Peckham) testified (R. 288) that once in the room with Dr. Smith (defendant) he, the interne, was there to carry out Dr. Smith's orders, rather than those of Dr. Mitrani (resident physician at Emergency Hospital), and that if Dr. Smith (defendant) had ordered him out of the room, he would have gone.*

We submit that the court committed error in holding that there was no substantive evidence in behalf of plaintiff that Dr. Peckham, the interne, was the agent of defendant at the time he carried out the order and direction of defendant in administering the hypodermoclysis to the plaintiff.

(b) The question of the agency of Dr. Peckham, the interne, should have been left to the jury. The undisputed testimony of the interne was that his duties were to carry out instructions of surgeons performing

operations at Emergency Hospital, and that he would not have administered the post-operative treatment to plaintiff unless ordered to do so by defendant (R. 260, 277, 278, 288; see Point II (a), *infra*, pp. 40-46).

Where the question as to the existence of the relation of master and servant is a mixed one of law and fact, it must be left to the jury. *Brophy v. Bartlett*, 108 N. Y. 632, reversing 32 Hun 642.

In the leading case of *Aderhold, et al., v. Bishop*, 94 Okla. 203, 221 Pac. 752 (1923), the court held:

“That where a patient engages a firm of surgeons to perform a surgical operation for the removal of a goitre, and goes to an incorporated hospital for the operation, and where during the operation, the services of a head nurse of and general employee of the hospital are used by the operating surgeons in the performance of the operation, such operating surgeons are liable for any negligent act of such head nurse in respect of the service performed by her and made use of by the operating surgeons in the performance of the operation.

“Under such circumstances the relation of master and servant exists between the operating surgeons and the head nurse during such time as is required for the performance of the operation, although such head nurse may not be in the regular employ of the operating surgeons.

“A third person to whom servants of a general master have been temporarily loaned, with their consent, is for the time being their master, he having for the time being control of the servant.”

In the course of its opinion, the court said:

“We can conceive of no instance in which the application of the doctrine of *respondeat superior* could exercise a more salutary influence than in cases of damages arising out of surgical operations. The patient is helpless under the influence of an anaesthetic, and absolutely at the mercy of the surgeons performing the opera-

tion, and they are charged with the duty to see that no preventable injury results to their patients. Under the modern science of surgery, a surgical operation, with modern hospital appointments is a complex enterprise. Especially the various agencies that enter into it must be performed by different individuals under the active supervision and direction of the operating surgeons in charge. If the operating surgeons were not made liable for the negligent performance of the duties of those working for him (*sic*) the law in a large measure would fail in effecting a means of redress for preventable injuries sustained from surgical operations."

In *Nash v. Royster*, 189 N. C. 408, 412, the court held that where a surgeon has performed an operation upon his patient and left her in charge of another surgeon and physician for further treatment, the former may be liable for the malpractice of the latter, proximately resulting in an injury to the patient, in the absence of a special contract with the patient, or those having her in charge, that he would not be responsible therefor. The court held:

"That a surgeon may contract only to surgically operate upon the patient and not be responsible for the treatment of another in taking charge after the operation; and where the operation has been properly performed, and injury results from the malpractice of the one taking charge of the patient thereafter, and the evidence is conflicting as to whether the latter was acting as agent for the former, or independently employed by the parents or others having charge of the patient, an issue of fact is raised for the determination of the jury."

In *Nash v. Royster*, *supra*, the court also held that in view of the conflict of testimony, the trial judge erred in holding, as a matter of law, that the relation of master and servant necessarily followed, but that the question of agency should have been submitted to the jury.

In the instant case, there was no conflict in the testimony, and we submit that particularly in the absence of any testimony by the defendant, the trial court would have been justified in holding as matter of law that the interne was the agent of the defendant. At least, the plaintiff was entitled to have the question of agency, as well as the question of negligence (hereafter discussed under Point III, *infra*, pp. 49-57), submitted to the jury.

POINT III.

Plaintiff's evidence disclosed actionable negligence of defendant, and also of his agent, Dr. Peckham, the interne, entitling plaintiff to have her case submitted to the jury.

Dr. Peckham, the interne, testified:

That it was part of his duties to carry out instructions and directions of any surgeon operating at Emergency Hospital; that defendant knew that he was interne at that Hospital, that after defendant performed gall bladder operation on plaintiff, defendant spoke to him (Dr. Peckham) in the hall and asked him to give the plaintiff the hypodermoclysis; "Dr. Smith ordered that" (R. 260); that the chart in the file of Hospital shows that Dr. Smith ordered a hypodermoclysis be given to plaintiff, and "pursuant to those directions, I gave patient hypodermoclysis (R. 243), within a matter of minutes following gall bladder operation, after patient had been removed to her private room from operating room. Patient had been given general anaesthetic for gall bladder operation. I recall that she was unconscious at time I gave her the hypodermoclysis though I do not recall how long she remained under the effect of general anaesthetic (R. 244); that he made no preparation of patient for hypodermoclysis injection by

strapping her or confining her body so it would be immovable (R. 250); the plaintiff was completely unconscious at the time (R. 251); that prior to inserting needle in plaintiff, witness looked at the needles and they appeared all right (R. 251); that after the hub broke witness looked at it pretty closely because of the ease with which it had broken off and it appeared that the inside was rusty—it was a little dirty looking; it appeared a little blackish (R. 251); that generally witness inspects points of needle, but witness could not recall that he inspected this one (R. 251 [see pp. 20-23, *infra*, as to the detailed description by witness as to insertion of needle in plaintiff's breast and the breaking off of same and becoming embedded in plaintiff's breast]).

The interne further testified that he tried to remove the broken needle from the plaintiff's breast, but he was unable to do so; that Dr. Matrani, resident physician, was notified, who responded, and he made an incision in plaintiff's breast of about half inch long, but being unsuccessful in locating the end of the broken needle, he decided it was no use to make further attempts, and called the defendant, Dr. Smith (R. pp. 244-5), whose decision was to leave patient alone temporarily; that the needle that was broken in plaintiff's body was about two inches in length, hollow in center, with sharp point at one end and evenly broken at the other (R. 246); the interne further testified that the needle was a steel one and it appeared to be defective, and in his opinion it broke off because it was defective, and that witness did not see or know about it and does not observe (R. pp. 275-6); needle was shown to the witness and he testified that it does appear rusty on the point at present time (R. pp. 252-3).

On March 7, 1936, plaintiff visited defendant at his office and he told her if she wanted sun ray treatments they would not cost her anything (R. 49); that plaintiff

was called to defendant's examination table; defendant took by her arm, started to stroke it; plaintiff did not know what defendant's idea was; he said, "Well, I will tell you. We had a little accident at the hospital. *My interne there broke off a needle in you* (R. pp. 49-50). *It is still there.* We will have to take it out before it either causes an infection or moves down to a danger zone. Come to the other room and I will show you what kind of a needle it was." Plaintiff and defendant went into the other room. Defendant got a sub-Q needle, and said: "This is what broke off in your side. *Of course, it was rusty, but you needn't tell anybody about it.* Don't tell anybody at all. You can tell your family you are going to a show or something, and you can come down and we will take it out." Plaintiff said, "I certainly am relieved to find out what that pain was caused by." Defendant patted plaintiff's arm and said, "Don't tell anybody, don't tell anybody at all" (R. 50).

Plaintiff testified (R. 57-58) that on March 16, 1936, she and defendant had a conversation in regard to the needle, defendant saying: "Now, of course, we know that the needle was rusty, and furthermore, my interne did not turn on the light when he brought you back from the operating room. All rooms are kept dark when patients are brought back to the room. He did not turn on the light. Therefore, he could not see what he was doing" (R. 57). Plaintiff remarked to defendant: "Wasn't that very careless?" Defendant said to plaintiff: "Of course, it was careless, but don't blame that poor boy at the hospital. If you are going to blame anyone, blame me. There is nothing that you can do about it. You can't do a thing about it" (R. 57, 8).

The rules applicable to a motion by defendant for a directed verdict in cases like this are well settled, and are stated by this court in *Gunning v. Cooley*, 58 App. D. C. 304, 305, affirmed 281 U. S. 90, 94. Among other cases decided by this court, and quoted from in the

Gunning-Cooley case is *Catholic University v. Waggonman*, 32 App. D. C. 307, 320, in which it is said:

“The courts of review in this country are applying with increasing strictness the rules limiting the right of the trial judge to invade the province of the jury. * * * The rule more generally followed is that ‘it is only where all reasonable men can draw but one inference from the undisputed facts that the question to be determined is one of law for the Court.’”

How can it be said, under the evidence submitted by the plaintiff in the instant case, that but one reasonable view can be taken of the evidence and of its every intendment, and that view is utterly opposed to the plaintiff’s right to recover (*Baltimore & P. R. Co. v. Carrington*, 3 App. D. C. 101, 108)? Did the trial court have the right to say that the evidence of plaintiff was not of a substantial character to go to the jury (*Warthen v. Hammond*, 5 App. D. C. 157, 173)? A motion to direct a verdict is an admission of every fact in evidence, and of every inference reasonably deducible therefrom (*Glaria v. Washington Southern R. Co.*, 30 App. D. C. 559, 563).

The following cases support our contention that the instant case should have been submitted to the jury.

Messina v. Societe, etc. (French Hospital), 170 So. 801, 804 (La. App. 1936), following the remarkably similar case of *Foye v. St. Francis Sanitarium*, 2 La. App. 305, in each of which cases, at the request of the operating physician, the interne employed by the hospital administered the hypodermoclysis to the patient, and in doing so used liquid too hot which resulted in burning the limbs of the patient, the physician was held liable even though at the time the treatment was given the physician was not present. In his concurring opinion, Judge McCaleb, at page 809, says:

“It seems certain that the duty of a surgeon

to his patient does not end in the operating room. In my opinion it is also his duty to administer such treatment as is necessary until such time as it is ascertained that the patient is out of danger. For if it were otherwise, doctors would shirk all responsibility immediately after the operation was performed and place upon the hospital the onus of treating the patient until full recovery."

Jordan v. Touro Infirmary (La. App.), 123 So. 726, in which the court held that a nurse furnished to patient in hospital is not its servant within statute while performing duties in operating room under the orders of the surgeon.

In *Armstrong v. Wallace, et al.*, 37 P. (2d) 467, 468 (1934), Cal. D. C. App. Third District, the court held that nurses in the surgery room are under the control of doctor during preparation and progress of an operation, and that the doctor, and not the hospital, is responsible for them. That case involved the liability of a surgeon, who performed a Caesarean operation upon plaintiff, for negligently leaving a sponge in patient's abdomen after closing the incision. Upon retrial, the case was again appealed. See *Armstrong v. Wallace*, 47 P. 740, D. C. Ct. Appls. Third District, Cal. (1935), rehearing denied, hearing denied by Supreme Court. The court held that the doctrine of *res ipsa loquitur* was applicable (p. 744), and also held (p. 745), that expert testimony was not necessary to show that leaving a gauze sponge fourteen inches square in patient's abdomen after Caesarean operation, and permitting sponge to remain undiscovered for five weeks was not good medical practice.

In *Saucier v. Ross* (1916), 112 Miss. 306, 73 So. 49, the court held that it is no answer to a suit against a surgeon for leaving a rubber tube in the patient's body after operation, that the rubber tube may have been left in her wound by an attendant nurse, or another physician who attended patient in the hospital, where the

operating surgeon was the patient's physician, and others were acting under his direction in the treatment, and he discharged her from the hospital when she left.

In *Bernstein v. Greenfield* (N. Y.), not yet officially reported, decided July 11, 1939, advance sheets N. E. Reporter, Sept. 6, 1939, and to be reported in 22 N. E. (2d) 242, reversing s. c. 255 App. Div. 982, 2 N. Y. S. (2d) 286, the Court of Appeals of New York held that:

“Evidence held sufficient to take to jury question of physician's malpractice in failing to take X-rays immediately after end of broken hypodermic needle became embedded in plaintiff's throat and in probing therefor, instead of trying to get it from outside through neck.”

In the last case cited, defendant's assistant while injecting with a hypodermic needle in the tonsillar area of the plaintiff broke the needle and the end of it became embedded in the plaintiff's throat, and several operations to remove it were unsuccessful. In the trial court the plaintiff recovered \$6,000. The Appellate Division reversed on the law. The Court of Appeals held that the case had been properly submitted to the jury, and in reversing directed that the judgment in favor of the plaintiff be re-instated.

In *Davis v. Kerr*, 239 Pa. 351, 86 A. 1007, 46 L. R. A. (NS) 611, a gauze pad had been left in the body of the plaintiff by the operating surgeon, who was assisted by two nurses in performing the operation. In removing the sponges or pads, the surgeon relied upon the count made by the two nurses. The court held the surgeon liable. In *Cayton v. English*, 57 App. D. C. 324, 23 F. (2d) 745, this court, at page 328, in commenting on the case of *Davis v. Kerr*, *supra*, says:

“Under no school of medicine could it be said that the leaving of a gauze pad in a wound was a proper practice.”

In *Griffis v. Brown*, 149 Wash. 203, the plaintiff.

Brown, went to the office of Griffis, a dentist, one of whose employees administered a hypodermic injection preliminary to removal of a tooth. Brown became sick and consulted a physician. X-ray showed hypodermic needle near site of extraction. Needle was removed. Brown sued the dentist for malpractice and recovered, it being held that the case was one for the jury to pass on Griffis' responsibility for leaving needle in plaintiff's gum. The case was reversed because the trial court allowed the jury to include other sickness of plaintiff not connected up with needle.

In *McCormick v. Jones*, 152 Wash. 508, defendant, in performing operation on plaintiff left a sponge in his back and closed the wound. Sponge later removed. The court said: "We think all the witnesses who testified on the subject on both sides admitted that the leaving of the sponge in the wound was negligence. We also think the court can say as a matter of law when a surgeon inadvertently introduces into a wound a foreign substance, closes up the wound, leaving the foreign substance in the body, there being no possibility of any good purpose resulting therefrom, the act constitutes negligence." See *Le Falve v. Asselin*, 262 Mich. 443, 247 N. W. 911.

Reinhold v. Spencer, 53 Idaho 688, 26 P. 796 (1933), defendant, a physician and surgeon, treated the plaintiff who was suffering from acute pneumonia, and it became necessary to perform an operation known as "tapping the lungs." Defendant, assisted by a nurse, used novacaine by means of a hypodermic syringe to deaden pain. The operation was scientifically and properly performed and the wound healed normally. An X-ray later disclosed a hypodermic needle lodged within the thoracic cavity of plaintiff. In an action for damages brought against the physician and surgeon, plaintiff recovered, which was affirmed on appeal. The court held:

"Evidence of surgeon's failure to remove hypodermic needle from patient's chest in performing operation held sufficient to make issue for jury of negligence in malpractice case. * * *

"Failure of surgeon to remove foreign object from patient's body during operation is at least evidence of negligence, and sufficient for submission to the jury without expert testimony." Citing *Moore v. Ivey* (Tex. C. App), 264 S. W. 283, 288, in which the Texas Court said:

"Probably the most common instances of malpractice which is brought into the courts arises out of surgical cases where the physician or attendant has left a sponge in the wound, and after the incision has been closed. That this plainly is negligence there is no doubt at all, and it matters not at all that many physicians testified that the best of surgeons sometimes leave a sponge or some other foreign substance in the bodies of their patients, for this is testimony merely to the effect that almost everyone is at times negligent. Whether the particular act was negligent is for the jury to decide after considering the circumstances of the case."

The court continues (p. 699):

"*In Wharton v. Warner*, 75 Wash. 470, 135 P. 235, it was held that where a surgeon leaves a metallic spring in the body of his patient, and fails to discover and remove it, the jury has abundant justification for inferring negligence without the aid of expert testimony." Citing cases. See *Ellering v. Gross* (Minn.), 248 N. W. 330.

In *Alderhold, et al., v. Bishop*, 94 Okl. 203, 221 p. 752 (1923), quoted from under Point II, *infra*, action for malpractice, where head nurse in hospital who assisted surgeon severely burned patient's limbs during operation, and in which case the court held that the head nurse was the agent of the surgeon, the court said (p. 207):

"We can conceive of no instance in which the application of the doctrine of *respondeat superior* could exercise a more salutory influence than in the case of damage arising out of surgical operations. The patient is helpless under the influence of an anaesthetic, and absolutely at the mercy of the surgeons performing the operation, and they are charged with the duty to see that no preventable injury results to their patients."

POINT IV.

Doctrine of *res ipsa loquitur* is applicable in this case.

In support of the foregoing proposition, we cite:

Sellers v. Noah, 209 Ala. 103, 95 So. 167 (1923).
Davis v. Kerr, 239 Pa. St. 351 (1913).
Wharton v. Warner, 75 Wash. 470, 135 P. 235.
Armstrong v. Wallace, 47 P. (2d) 740 (Cal.).
Godfrey v. Brown, 220 Cal. 57, 29 P. 165.
Reed v. Rosenthal, 129 Oregon 203, 276, p. 684,
 63 A. L. R. 1071.
Hall v. Grosvenor, 267 Ill. App. 119.
Pendergraft v. Royster, 203 N. C. 384, 166 S. E.
 285.

In *Sellers v. Noah*, *supra*, the court said (p. 105):

"Where a surgeon performing an operation leaves in the body of his subject, closing the wound, a foreign substance that causes injury or damage to the subject, the burden of proof passes to the impleaded surgeon to show that he exercised the stated reasonable and ordinary care, skill and diligence in respect of the operation upon the subject, including the process of closing the wound." Citing *Davis v. Kerr*, *supra*.

"When injury occurs while patient is unconscious, *res ipsa loquitur* applies." *Pendergraft v. Royster*, *supra*.

POINT V.

The peremptory instruction of Trial Court directing jury to find for defendant was a denial of right of trial by jury, and in violation of the Seventh Amendment to the Constitution of the United States.

We submit that the instruction of the trial court directing the jury to render their verdict for the defendant was an invasion of the province of the jury. The trial judge passed upon the credibility of the witnesses, and his reasons for directing a verdict ignored the essential outstanding evidence submitted by the plaintiff, and particularly the admissions of the defendant made to the plaintiff in their conversation relative to the interne breaking off the needle in the breast of the plaintiff, the detailed testimony having been heretofore set forth in this brief under Point III, *infra*, pp. 49-51.

Conclusion.

If this were an automobile accident case where the uncontradicted evidence disclosed that the cause of the accident and resulting injuries were admitted by the owner and his driver of the automobile to be due to *defective and rusty brakes and the failure to have the lights turned on*, could there be any doubt that the case were one for the jury? The evidence here discloses two such admitted acts of negligence.

We know the rule of human experience that a splinter beneath the skin or nail festers, and all too well its resulting consequences.

No decision of any court, and there are none, except the judgment below, and no multiplication of evidence of friends in the medical fraternity can overthrow our common sense judgment gained from daily observations.

We submit that not only the law, but every sense of justice, upon which all judgments should be based, dictate a reversal of this case, with costs to be taxed against the defendant.

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October 10, 1939.

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA
FILED NOV 13 1939

Joseph W. Smith
CLERK

IN THE
**United States Court of Appeals
for the District of Columbia**

APRIL TERM, 1939

No. 7461

MARY ELEANOR HOHENTHAL, *Appellant,*

v.

HOWARD LEE SMITH, *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

BRIEF ON BEHALF OF APPELLEE

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First Count:

- (a) Negligence as charged in the declaration.
- (b) That the negligence was the proximate cause of the injuries complained of.
- (c) That Doctor Smith was liable for the negligence under the doctrine of respondeat superior.
- (d) That the plaintiff was entitled to compensatory damages.

Second Count:

- (a) Negligence on the part of the defendant in not immediately removing the needle after notice of the accident.
- (b) That the defendant had not given her the care and attention which other physicians and surgeons of ordinary skill and ability practicing similar surgery in the District of Columbia would have given under the circumstances related.
- (c) Damages.

The plaintiff totally failed to sustain the burden imposed upon her under the decisions of this Court and other respectable authorities.

POINT II: The doctrine of *res ipsa loquitur* is not applicable in this case for the reason that it was not pleaded nor was any amendment ever sought to the pleadings which would make an issue in the case based upon that doctrine; that even if it was pleaded, *res ipsa loquitur* does not apply in malpractice cases in the District of Columbia 23

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IN THE
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APRIL TERM, 1939

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

BRIEF ON BEHALF OF APPELLEE

We shall follow the practice of the appellant in her brief and refer to the parties as they were designated in the Court below.

STATEMENT OF CASE

PLEADINGS

This case was commenced prior to the adoption of the new Federal Rules of Civil Procedure. The plaintiff, under Old Law Rule 22, was required to file her

declaration. It was in two counts, each count charging *specific acts* of negligence. Plaintiff, at Page 39 of her brief, states her cause of action as follows: "The first count charges defendant with liability for the negligent act of his agent, or interne, Dr. Henry L. Peckham, Jr., and the second count charges the defendant, or attending surgeon and physician of plaintiff, with improperly treating plaintiff after the broken needle had been left imbedded in plaintiff's body." This is the same position taken by plaintiff in the Court below as announced by the Court (R. 234) in directing a verdict for the defendant. The Court said * * * "in the first count she charges the defendant with the liability for the negligent act of the interne. * * * the second count charges Dr. Smith, the defendant, with improperly treating the patient after this needle had been left in her body." There was no *res ipsa loquitur* count nor did plaintiff ever seek to leave to amend so as to include one.

The defendant was required to plead under the old rules and by the practice then in force and effect in the District Court, he was required to plead such facts as he relied upon to defeat the cause of action. He filed one plea to each count. Each plea was a full answer to the charges contained in the plaintiff's declaration. Plaintiff, at Page 5 in her brief says * * * "notwithstanding his previous allegation that there was no defect in the needle that might cause plaintiff pain or difficulty." We desire to label the quotation a "misstatement." Defendant did not in either plea ever make any such allegation expressly or impliedly, and a reading of our pleas will justify this statement.

On September 16, 1938, the new Federal rules of civil procedure became effective. Prior to December 15, 1938, plaintiff served a motion on defendant to take the deposition of Dr. Henry L. Peckham, for the purpose of

using the same as evidence *on her own behalf*. That deposition was taken in accordance with the notice, on December 15, 1938. Plaintiff's counsel, on direct examination, asked his own witness whether or not the needle which was used in administering the hypodermoclysis in the operation was defective. The witness stated "It appeared to be." On cross-examination defendant developed from this witness such testimony as would be proper to offer on a defense of "latent defects." Defendant then sought leave to file an additional defense under the new Federal Rules of Civil Procedure (Rule 15). Accordingly, an additional defense of "latent defects" was filed "without objection" of plaintiff's counsel (R. 14).

EVIDENCE

Plaintiff's narrative of the evidence, so far as it goes, is reasonably accurate. This case, being filed in forma pauperis, the entire record, which included the complete transcript of testimony, is before this Court. There was no statement of evidence prepared by counsel.

Certain corrections or additions are necessary in the plaintiff's recital of the evidence. They are as follows:

On Page 5, plaintiff's brief, and in the recital of the evidence, it is stated that:

"Defendant * * * entered her into Emergency Hospital. * * *"

The record shows that plaintiff, herself, selected the Emergency Hospital and directed the defendant to make a contract on her behalf with the hospital for her room:

"Q. When you went to the hospital you were required to go to the desk, were you not, and complete your arrangements of your contract with the hospital?"

A. That is right. (R. 85.)

Q. Did you, yourself, select Emergency Hospital to go back to?

A. I suppose I did. * * *

Q. Did you go to the desk again and sign a contract for admission and payment * * *?

A. Not at the outside desk, I went to that glass enclosed room.

Q. But you then made your contract with the hospital for admission as a patient, did you not?

A. Yes. * * *

Q. And the customary contract, the one that you had executed in October, or one like it, was again executed in January, was it not?

A. I don't believe that I signed any paper.

Q. But you agreed upon what the terms would be, did you not?

A. Yes." (R. 92.)

The following testimony was not included by plaintiff in her narrative of the evidence. It is important that we call the Court's attention to it.

In plaintiff's cross-examination the following occurred:

"Q. Now from the time Dr. McPeak and Dr. Smith removed the needle, did you confer with any other physician, I mean from the time they removed the needle up until you saw Dr. Fifer? Did you confer with any other physicians?

A. I did.

Q. They were Dr. Courtney and Dr. Halley?

A. Yes.

Q. Have you subpoenaed them here?

A. No. I have not.

Q. Do you intend to?

A. No, I don't." (R. 144.)

In reciting the testimony of Dr. Peckham, the following testimony was omitted:

DIRECT EXAMINATION:

“Q. How is it then Doctor, if you inserted the needle directly forward, it being two inches long, if you did not strike a rib why didn't you pass between the ribs?

A. The whole length of the needle remains in the subcutaneous tissues and lies along side the ribs but not directly toward them.” (R. 249.)

CROSS EXAMINATION:

“* * * internes have their treks of duty or their assignments of service changed periodically. The chief resident of Emergency Hospital makes the change of assignments; that is also true in Garfield Hospital.” (R. 258.)

Plaintiff, at Page 25, in her brief, sets out a great deal of the evidence having to do with the examination of the hospital records by her counsel. There is no error assigned by plaintiff so far as this testimony goes, but if the Court is asked at this time to treat it as error, we call the Court's attention to the fact that Federal Rules of Civil Procedure 26, and particularly 34, were available to plaintiff's counsel had they desired to use them.

Further omitted testimony of Dr. Peckham:

“Q. Did there come a time after the operation that you heard Dr. Smith leave or give any orders so far as the patient was concerned?

A. There was.

Q. Can you tell us how and by what manner it was done?

A. Dr. Smith spoke to me in the hallway following the operation and asked me if I would give the patient the hypodermoclysis.

Q. Was that what he ordered?

A. Yes.

Q. Is that a customary thing to be done after an operation?

A. Yes.

Q. Is it a fact that Dr. Smith knew you were an interne at the hospital?

A. Yes.

Q. Is it a further fact he knew it was part of your duties as an interne to carry out the orders of the operating surgeon?

A. Yes.

Q. Isn't it a fact that it was your duty or part of your duties as an interne to carry out any orders given by the operating surgeon?

A. Yes, it was.

Q. You or any other interne on the surgical staff at that time?

A. Yes.

Q. So that as a matter of fact you were simply carrying out part of your routine duties as an interne at the time you administered the hydermoclysis?

A. That is right." (R. 261.)

* * *

"* * * The witness recalled that there was a drainage tube inserted after the operation to allow the accumulation of blood or bile to get out of the body; also for the purpose of letting out any infection. (R. 271.)

The fluctuation of temperature in the patient on the first, fourth and the sixth and seventh days might be considered normal. Starting on the eighth day to the thirteenth, the temperature would indicate a complicated infection of some type; from the fourteenth on there was no longer any infection. (R. 271.)

Q. All during this time did you find anything in the chart to indicate any seat or form of infection at all near the point where the needle went into the patient?

A. No." (R. 272.)

* * *

"* * * Q. Did the patient complain of any pain or any discomfort at all about or near the point where the needle penetrated her body?

A. Not that I recall.

Q. Did she make any complaints about her condition as to that time, if you can recall?

A. Not that I can recall. (R. 273.)

* * * Q. Is it not a fact if she had an infection on March 9th when she came back for the removal of the needle that she would have an elevation of her temperature?

A. Most likely she would.

Q. Then, in your opinion, Doctor, do you think she had any infection on March 9, 1936 when the needle was removed?

A. Not sufficient to cause any elevation of temperature.

* * * Q. You say the needle that you stuck into the body of patient was defective and that it broke off because of a defect that you did not see and didn't know about and not due to anything that you did when you were administering the hypodermoclysis?

A. Yes.

Q. Doctor, do you say now that this needle was a defective needle and that the defect was unknown or unobserved by you and that the accident happened because the defective needle broke off due to its own defects rather than by anything done by you? Is that how that happened, Doctor?

A. Yes.

Q. Now did you understand the question?

A. Yes." (R. 275.)

Doctor Smith never told the witness not to make any entry on the chart so far as the breaking off of the needle was concerned. (R. 285.)

Examination of Dr. Fifer by her own counsel:

"* * * Q. Did you locate the site of the trouble?

A. I think I did, yes.

Q. Tell us what it was?

A. I thought at first that she had a painful scar. But the further along I went, the more I believed it was not a painful scar, but more a worked-up case, psychological.

Q. What was that?

A. I thought at first it was a painful scar, but the further it went along, the more I felt that it was not a painful scar.

Q. What opinion did you arrive at?

A. I arrived at the opinion that I did not think she was having as much pain as she did when I first saw her. * * *'' (R. 181.)

SUMMARY OF ARGUMENT

Point I

The motion for the directed verdict was properly granted because the burden of proof rested upon the plaintiff to prove:

FIRST COUNT:

- (a) Negligence as charged in the declaration.
- (b) That the negligence was the proximate cause of the injuries complained of.
- (c) That Doctor Smith was liable for the negligence under the doctrine of respondeat superior.
- (d) That the plaintiff was entitled to compensatory damages.

SECOND COUNT:

- (a) Negligence on the part of the defendant in not immediately removing the needle after notice of the accident.

(b) That the defendant had not given her the care and attention which other physicians and surgeons of ordinary skill and ability practicing similar surgery in the District of Columbia would have given under the circumstances related.

(c) Damages.

The plaintiff totally failed to sustain the burden imposed upon her under the decisions of this Court and other respectable authorities.

Point II

The doctrine of *res ipsa loquitur* is not applicable in this case for the reason that it was not pleaded nor was any amendment ever sought to the pleadings which would make an issue in the case based upon that doctrine; that even if it was pleaded, *res ipsa loquitur* does not apply in malpractice cases in the District of Columbia.

Point III

The defendant's constitutional rights were not infringed or violated.

ARGUMENT

Point I

The motion for the directed verdict was properly granted because the burden of proof rested upon the plaintiff to prove:

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- (a) Negligence as charged in the declaration.
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SECOND COUNT:

- (a) Negligence on the part of the defendant in not immediately removing the needle after notice of the accident.
- (b) That the defendant had not given her the care and attention which other physicians and surgeons of ordinary skill and ability practicing similar surgery in the District of Columbia would have given under the circumstances related.
- (c) Damages.

In arguing on Point I, we shall attempt to answer plaintiff's argument as set forth in her brief on Points I, II, and III.

The rule as to the burden of proof in malpractice cases is unmistakably laid down in this jurisdiction by virtue of the following:

"The burden was on plaintiff to establish the negligence and injury alleged; and, if the evidence failed adequately to support either element, defendant's motion (for a directed verdict) should have been granted." (Parenthesis ours.) *Gunning v. Cooley*, 281 U. S. 90, 94, 74 L. ed. 720, 724.

"* * * But one who seeks to recover against a physician alleging lack of skill or negligence causing injury, has the burden of proving his averments." *Cayton v. English*, 57 App. 324, 327, 23 F. (2d) 745.

“Before the plaintiff can recover, she must show by affirmative evidence—first, that the defendant was unskillful or negligent; and, second, that this want of skill or care caused injury to the plaintiff. If either element is lacking in her proof, she has presented no case for the consideration of the jury.” *Ewing v. Goode*, 78 F. 442.

See also:

Levy v. Vaughan, 42 App. D. C. 146;
Carr v. Shifflette, 65 App. D. C. 268, 83 F. (2d) 874;
Olander v. Johnson, 258 Ill. App. 89, 95.

Plaintiff completely failed to carry the burden of proof on the question of negligence under the foregoing authorities. She rests her entire case, at least so far as her first count is concerned, upon the mere fact that the needle broke off while the hypodermoclysis was being administered by Dr. Peckham. Until she offers some testimony as to the negligence of Dr. Peckham in giving the treatment, it is our contention that we need not be concerned as to whether or not Dr. Peckham was the agent, servant, and employee of the defendant, for *respondeat superior* is applied only when negligence is established.

Plaintiff argues in her brief, pp. 39, 40, that the defendant admits “In one of the previous pleas * * * that there was no defect in the needle, etc.” We have denied this heretofore in our summary of the pleadings. We again deny that the pleas contained any such admission. We submit that our “additional defense” of “latent defects” was made out by plaintiff’s counsel while examining his own witness, Dr. Peckham. The following evidence taken from the record argues this fact for us:

By Mr. Wood:

“Q. Will you state whether or not the needle inserted in her body on that day was defective?

A. It appeared to be * * *." (R. 255.)

By Mr. Canfield:

"Q. You say the needle that was stuck into the body of the patient was defective and that it broke off because of a defect that you did not see and know about and not due to anything that you did while you were administering the hypodermoclysis?

A. Yes.

Q. Doctor, do you say that this needle was a defective needle and that the defect was unknown or unobserved by you and that the accident happened because the defective needle broke off due to its own defect rather than anything done by you? Is that how it happened, Doctor?

A. Yes." (R. 275.)

Plaintiff's counsel in their brief insist that we have filed inconsistent defenses. We answer that by saying that we have not; however, if that were the case we were justified in so doing both under the old rules of pleading, as well as the new Federal Rules of Civil Procedure. *Whitaker v. Freeman*, 12 N. C. (1 Devereux L.), 271 Fed. Cas. No. 17, 527 A. (opinion Mr. Chief Justice John Marshal); *Keigwin, Cases in Common Law Pleading*, 2nd Ed. 545, 550; Title 24, Ch. 1, Sec. 11, D. C. Code; Comp. Stat. D. C., p. 447, Sec. 35; Rule 8(e), Fed. Rules Civ. Pro.

We contend that the plaintiff instead of proving negligence as to the first count, proved by her own testimony that the accident occurred not by virtue of any negligence on the part of the interne, but by a defect in a piece of apparatus not furnished by the defendant nor at any time under his control.

In the case of *Ratliffe v. Wesley Hospital Nurses' Training School*, 10 P. 2d 859, defendant contended as part of its defense that the injury sustained by

plaintiff was the result of latent defects in the apparatus used while treating her after an operation. The defense was held to be good and plaintiff denied the right to recover.

Plaintiff insists that the interne, Dr. Peckham, was the agent, servant and employee of the defendant. The record in this case clearly indicates that Dr. Peckham was but an interne carrying out a routine order such as is usually given to hospital attendants immediately following the operations. The record discloses that the apparatus was prepared by the hospital attendants, assembled by its attendants in a sterile pack and was handed to the interne, for the purpose of giving the hypodermoclysis. The defendant was not present, he had no control whatever over the apparatus or equipment, and had no control or direction over the interne, Dr. Peckham, at the time the treatment was given. He did not prescribe the method by which it should be given, the point of contact into the patient's body nor any of the details or methods to be used in the treatment. The plaintiff admitted making her own arrangements and contract with the Emergency Hospital on the day of her admission (R. 92).

This Court will find upon an examination of cases cited by plaintiff in support of her appeal, and dealing with this point, that they invariably treat of a situation where one "loans" his agent, servant or employee to another for the purpose of doing something for and on behalf of the borrower. The law in this regard so far as this Court is concerned is settled by the recent case of *Phelps v. Boone*, 62 App. D. C. 308, 67 Fed. (2d) 574, from which we quote:

"The usual test in such circumstances, that is to say, the determination of liability for a negligent act on the part of a servant, is the right or the power on the part of the person charged, to com-

mand and control the servant in the performance of the causal act *at the moment of performance*. Under the conditions the employer or master is the person who at the moment has the power of control." Citing cases. (Italics ours.)

The above decision is consistent and in line with the expression of the Supreme Court of the United States in *Denton v. Yazoo and M. Valley R. Co.*, 284 U. S. 305, 76 L. ed. 310.

The case of *Aderhold v. Bishop*, 94 Okla. 203, 221 Pac. 752, stressed with importance by the plaintiff in her brief is clearly distinguishable from the case at bar. In the *Aderhold* case, the opinion of the Court discloses "there is no evidence that plaintiff made any contract with the defendants concerning the El Reno Sanitarium or for any service which the El Reno Sanitarium should perform in connection with her operation, the contract being a simple engagement by the defendants to perform on plaintiff an operation for the removal of her goiter." Again, and in that case plaintiff's injuries occurred while she was on the operating table where both defendant surgeons were participating in the surgical treatment given to her. While she was on the operating table and under the anaesthetic she suffered severe burns due to negligence on the part of a nurse or other hospital attendants who were working immediately under the control and direction of the operating surgeons—the defendants in that case. In the case at bar, the operation had been concluded and the patient sent to her room for routine hospital treatment and, as we said above, the treatment was being administered by the interne as part of his duties at the hospital with the assistance of nurses in the employ of the hospital and the equipment furnished by the hospital. The case of *Messina v. Societe, etc., Hospital* (La. App.), 170 So.

801, 804 (1936), cited by the plaintiff in her brief, is reported in three written opinions by the three justices who heard and determined the case. The opinion of one of the judges follows the great weight of authority as we shall point out, *infra*, and held that the interne was the agent of the hospital and not of the operating surgeon. The concurring judges, while concurring with the opinion of the Appellate Court on the ultimate decision of the case, cite with authority the case of *Aderhold v. Bishop*, *supra*, but an examination of the concurring opinions leads us to say that had the plaintiff in that case made a contract with a hospital looking to the routine care and treatment required after post-operative surgery, that they too, would have recognized the almost unanimity of opinion in other jurisdictions on this point.

An examination of the remaining cases cited by plaintiff in support of her contention on this point fails, in our opinion, to sustain the application of the doctrine of *respondeat superior* to any case like the case at bar. We think the point is settled in this jurisdiction by reason of the following decisions.

The case of *Harris v. Fall*, reported in 177 Fed. 79, 27 L. R. A. (N. S.), 1174, 1180, containing the following:

“Support for the instruction, therefore, rests on this proposition: That the engagement of Dr. Harris, under the circumstances in evidence, conclusively implies his obligation, not only to perform and complete the operation,—which, as defined in *Akridge v. Noble*, *supra*, ‘begins when the opening is made into the body and ends when this opening has been closed in a proper way after all appliances necessary to the successful operation have been removed from the body,’—but to attend either personally to all care, dressings, and treatment required, or employ professional assistants therefor, until recovery or discharge from

such care. We believe no such undertaking on the part of Dr. Harris can reasonably be presumed under the evidence, and that it is without sanction under any authority called to attention. The proposition ignores these potent facts: The patient entered the Polyclinic Hospital, contracted there for his room and accommodations, and received care and treatment from its nurses and house physicians throughout his stay, for which he made weekly payments; and the hospital was incorporated for general hospital purposes, under management of a board of trustees, was neither owned nor controlled by Dr. Harris, nor were the house physicians selected or engaged by him, nor within his control, except as their services were tendered as part of the hospital service. We believe, moreover, that proof of local custom in respect of such hospital service was not needed; that the general custom of incorporated general hospitals in like localities, to furnish like service, and of reliance thereon by an independent operating surgeon and by patients therein for the usual care and after-treatment incidental to an operation, are matters within common knowledge and entitled to notice accordingly. In *Baker v. Wentworth*, 155 Mass. 338, 29 N. E. 589, this custom in respect of nurses is recognized, and the operating surgeon held exempt from liability for negligence of the nurses, although the patient supposed (in the absence of representations) that the hospital was owned by the surgeon; and in *Perionowsky v. Freeman*, 4 Fost. & F. 977, 980, Cockburn, Ch. J., remarked upon the practice (there proven) of surgeons to leave care of their patients in various details to the hospital nurses, that such practice was 'indispensable,' and the operating surgeon was not liable for their negligence. So, these hospital attendants, known as 'internes' (usually young physicians), are furnished at the general hospitals to attend to the ordinary work of dressing and treating the wound (left by an operation) on the way to recovery; and the mere undertaking of the

surgeon to operate, under call or engagement therefor, cannot, as we believe, imply his further personal undertaking for the ordinary details of after-treatment, to make the doctrine of *respondeat superior* applicable, to charge him for fault or negligence on the part of such hospital attendants, neither known nor discoverable by the surgeon in the exercise of care and skill throughout his engagement. No doubt is entertainable, however, that the professional undertaking in the case at bar extended as well to the subsequent visits, observations, and personal treatment in evidence, with the attendant obligation for the exercise of skill and care therein."

"* * * At this date, when it is well known that there are physicians and surgeons of special skill in particular branches of their profession, it could not safely be announced as a general rule of law, applicable to such cases as this, that a surgeon who performs an operation is liable for the negligence of other physicians, nurses or internes in hospitals in the after treatment, unless he specially undertakes such employment. * * *"

"There are, however, cases which sustain the position contended for by the appellant which we have indicated by what we have said above is the correct rule in regard to the liability of the surgeon for treatment by other surgeons, nurses, and internes employed in hospitals after the operation is over." *Humner v. Stephenson*, 122 Md. 40, 89 Atl. 418.

The Maryland Court then cited with approval the case of *Harris v. Fall*, *supra*, *Baker v. Wentworth*, 155 Mass. 338, 29 N. E. 589, and *Perionowsky v. Freeman*, 4 Foster and F. 997, 980.

In the case of *Broz. v. Omaha Maternity and General Hospital Ass'n*, 148 N. W. 577:

“The pleadings, evidence, and circumstances justify a finding that he was admitted to the hospital under an implied obligation that he should receive such reasonable care and attention for his safety as his mental and physical condition required. The physician employed by him did not relieve the hospital of responsibility for negligence on its part, if any. The patient was under the personal observation of his physician only a small portion of the time. In the latter’s absence and during emergencies he was under the care of the nurses and the interne who were employees of the hospital. Within the scope of their employment, their employer is legally responsible for their negligence to a patient. *Wetzell v. Omaha Maternity and General Hospital Ass’n*, 148 N. W. 582. The patient’s physician did not manage or control the hospital, and he is not liable for the negligence of hospital nurses and internes, if he had no connection with any negligent act.” Citing with approval *Harris v. Fall*, *supra*.

“This defendant was not chargeable with the negligence, if any, of the nurses employed by the hospital. *Baker v. Wentworth*, 155 Mass 338, 29 N. E. 589.”

Blackburn v. Baker, 237 N. Y. S. 611, 613.

* * * “The injury was caused by the negligence of a hospital nurse, for whose service the plaintiff paid the hospital, and whose work the defendant was under no duty to supervise and would not have been permitted to supervise, and for whose negligence he was not responsible.”

Stewart v. Manasses, 222 Pa. State Rep. 222, 90 A. 574.

“Asserting that the relation of respondeat superior existed between Dr. Ryan and the others in the room at the time the operation was performed, the plaintiff contends that the Trial Court erred in giving the first two instructions just mentioned

and refusing the other. With this contention we do not agree. It cannot be said that the relation of master and servant existed between Dr. Ryan and any other person present in the room. There is no evidence that would justify the application of the doctrine *qui facit per alium facit per se*. *Guell v. Tenney*, 262 Mass. 54, 159 N. E. 451; *Blackburn v. Baker*, 227 App. Div. 588, 237 N. Y. S. 611, 613; *Maberto v. Wolfe*, 106 Cal. App. 202, 289 P. 218."

Ales v. Ryan, 54 P. 2nd, 782, 785.

"Before a plaintiff can recover in a malpractice case, it must be shown by affirmative evidence, first, that defendant was unskillful and negligent, and second, that his want of skill and care caused injury to plaintiff. If either element is lacking in the proof, no case is presented for a jury." Citing cases including *Ewing v. Goode*. * * * "The doctrine of *res ipsa loquitur* is not applicable to situations like the case at bar, citing cases." * * *

"Generally an operating surgeon is not legally responsible for the mistake of a nurse not his employee, where an operation is performed at a hospital not owned or controlled by the surgeon."

Olander v. Johnson, *supra*.

See also:

Moore v. Tremelling, 78 Fed. (2d) 821, 825.

We recognize the existence of a line of cases which hold that nurses and internes may be treated as agents and employees of the operating surgeon during the time of the immediate operation when the surgeon is in complete control of the movements of all persons working with or under him and we likewise recognize the fact that certain courts have held the negligence of one of the nurses or internes occurring during the operation to be chargeable to the defendant surgeon under the doctrine of *respondeat superior*; there is likewise

an equally strong line of cases which hold to the contrary. It is on this first theory that plaintiff is attempting to bring her case within in spite of the fact that the evidence unmistakably discloses that the operation was over, the patient removed to her own room which she had contracted for and while there was being given a treatment as a routine matter, such as is given to all patients after an operation similar to the one to which the plaintiff submitted. There is no evidence in the case that the defendant was required to administer the hyodermoclysis himself, either as part of his surgical treatment or post-operative care. Under the law, as we have submitted it above, the Trial Court was correct in holding that "the interne was not in the employ of the defendant" nor was he in any wise his agent.

In the second count plaintiff charged in substance that the defendant was negligent in failing to remove the needle from her body after he had notice of the accident. Again, the burden rests upon the plaintiff to prove the charge as laid. This Court has repeatedly laid down the rule to which the plaintiff's evidence must conform. We quote the following:

"* * * In order that the plaintiff might make out her case, it was necessary for her to show to the satisfaction of the jury that the defendant had not given her the care and attention which a physician and surgeon of ordinary skill and ability practicing in the District would have given under the circumstances related. This is not denied. *She could not prove it, except by surgeons who knew what care and attention such surgeons would have given. Laymen would have been incompetent to testify upon the subject.* The jurors knew nothing about it. It was quite different from an ordinary case of negligence, where the jury is able to solve the question by applying thereto their own experiences. In such a case the test is:—How would a reasonably prudent man have acted under the cir-

cumstances? *Texas & Pac. Ry. v. Barrett*, 166 U. S. 617, 619, 17 Sup. Ct. 707, 41 L. ed. 1136. There is no room for expert testimony in a case like that. *But here it was necessary that the experts should tell the jury the essential thing, namely, whether or not the defendant's treatment of the plaintiff satisfied the standards of care observed by surgeons of ordinary skill in the District.* If they simply answered, as suggested by appellant, that the treatment was improper or unskillful, they would not have gone far enough. The jury would still be in the dark as to whether or not the treatment was in accordance with the standards just mentioned. Light upon the subject could be given only by an answer to a question such as the one propounded. (Italics ours.)

“* * * ‘The question of negligence and carelessness on the part of the surgeon in the treatment he gave the plaintiff's leg, while it is one which the jury must necessarily determine upon the whole evidence in the case, is still a question which must be determined mainly upon expert evidence,’ and in such case it is admissible for the person on whom the burden is to show, if he can, ‘by witnesses having superior knowledge and skill in surgery, that the treatment he gave the plaintiff's leg was such as a surgeon of ordinary knowledge and skill in his profession would and ought to have given’ * * *” *Carson v. Jackson*, 52 App. D. C. 51, 55, 281 Fed. 411.

See also:

Cayton v. English, 57 App. D. C. 327.

Also

“* * * but when a case concerns the highly specialized art of treating an eye for cataract, or for the mysterious and dread disease of glaucoma, with respect to which a layman can have no knowledge at all, *the court and jury must be dependent*

*on expert evidence. There can be no other guide, and where want of skill or attention is not thus shown by expert evidence applied to the facts, there is no evidence of it proper to be submitted to the jury * * *.*" *Ewing v. Goode*, supra, p. 444. (Italics ours.)

A search of this record will disclose that the plaintiff has hopelessly failed to carry the burden imposed upon her. She was required as the cases point out, to introduce medical testimony to prove the alleged malpractice. An examination of the record discloses that her own witness, Dr. Peckham, was not even interrogated on this point. The record also discloses that while the needle was in her body she consulted Dr. Francis X. Courtney and Dr. Charles E. L. Halley. She not only failed to produce them as her witnesses in the Trial Court below, but when asked if she intended to produce them, she stated that she did not (R. 144). The inference can safely be drawn that had she done so, their testimony would have been unfavorable to her and contrary to her contentions. Dr. McPeak, who assisted in removing the needle and whom she went to see (R. 61) after the needle was removed, was not produced by her. Again the same inference could be drawn. But the important thing is that she did seek professional treatment after the needle was removed, from Dr. Carson L. Fifer, whom she called as a witness on her own behalf. We call the Court's attention to the fact that nowhere in the testimony of Dr. Fifer was he asked for his own opinion on the alleged negligence. Certainly, he would be in a position to know as to whether or not Dr. Smith was negligent in permitting the needle to remain in the patient's body as charged in the declaration. Not only did Dr. Fifer fail to testify as to the alleged negligence but, on direct examination by plaintiff's own counsel, he stated, "I thought at

first that she had a painful scar, but the further I went along, the more I believed it was not a painful scar *but more a worked-up case, psychological.*" This would seem to indicate to us that the plaintiff not only failed to prove her charges, but on the other hand is met with the testimony of her own witness who accused her of malingering.

We think that in view of the foregoing, the Court below had no alternative but than to direct a verdict for the defendant on each count.

Point II

The doctrine of *res ipsa loquitur* is not applicable in this case for the reason that it was not pleaded nor was any amendment ever sought to the pleadings which would make an issue in the case based upon that doctrine; that even if it was pleaded, *res ipsa loquitur* does not apply in malpractice cases in the District of Columbia.

As we said above, the declaration filed in this case charges specific acts of negligence and the plaintiff was compelled to introduce testimony in an effort to sustain the alleged specific negligence. This she absolutely failed to do. Again, no amended pleading was ever offered or filed by plaintiff in an effort to frame an issue based upon the doctrine of *res ipsa loquitur*; however, had such a pleading been tendered, it would not have availed the plaintiff anything, for it is our contention that the doctrine of *res ipsa loquitur* is not applicable in malpractice cases in the District of Columbia. The following authorities justify that statement:

"* * * A physician is not a warrantor of cures. If the maxim '*res ipsa loquitur*' were applicable to a case like this, and a failure to cure were held

to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art for they would have to secure financial liability for nearly all the 'ills that flesh is heir to.' " *Ewing v. Goode*, supra, p. 443.

"Generally speaking, no inference of negligence can be drawn from the result of the treatment of a physician or surgeon. In the absence of special contract, they are not insurers, and there must be evidence of negligence by witnesses qualified to testify. *Wood v. Barker*, 49 Michigan 295, 13 N. W. 597; *Pyles v. Hughes*, 10 Iowa 579. If the maxim *res ipsa loquitur* were applicable to a case like this, and a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art, for they would have to secure financial liability for nearly all the 'ills that flesh is heir to.' *Ewing v. Goode*, 78 Fed. 442." *Sweeney v. Erving*, 35 App. D. C. 57, 62.

The latter case went to the Supreme Court of the United States and is reported in 228 U. S. 232, 57 L. (ed.) 815, 819. In the Supreme Court decision, that Court stated that it was not necessary for it to pass on the question as to whether or not an X-ray burn came within the rule of *res ipsa loquitur* but the Supreme Court opinion did say the following:

"The rule of *res ipsa loquitur* does not relieve the plaintiff of the burden of showing negligence, nor does it raise any presumption in his favor."

See also:

Withington v. Jennings, 263 Mass. 484, 149 N. E. 201;

Guell v. Tenney (Mass.), 159 N. E. 451;

Olander v. Johnson, *supra*.

Ratliffe v. Wesley Hospital Nurses' Training School, *supra*.

Point III

The defendant's constitutional rights were not infringed or violated.

Plaintiff argues in her brief at Page 58, that the action of the Trial Court in directing a verdict violates her constitutional rights under the Seventh Amendment to the Constitution. No cases are cited in support of the contention. That point is definitely settled *contra* by decisions of the Supreme Court of the United States. See:

Slocum v. New York Life Insurance Company, 228

U. S. 364, 57 L. ed. 888, et seq.;

Hodges v. Easton, 106 U. S. 408, 27 L. ed. 169.

CONCLUSION

Plaintiff, in her conclusion seems to abandon any idea of *res ipsa loquitur* being applicable in that she states, Page 58, "The evidence here discloses two such admitted acts of negligence." On the same page plaintiff applies the rule of human experience in contending for a reversal, and cites the fact that a splinter beneath the skin or nail festers and its resulting consequence all too well known. That is indulging in something not sustained by the record. It should not be accepted by this Court as an established fact. Responsible and well recognized medical authorities have written volumes on the fact that a foreign body introduced into the human body does not necessarily cause infection unless the foreign body comes into contact with vital organs or

the blood stream. A great many war veterans and victims of gun shot wounds are walking the streets today with steel imbedded in their body, but, because the same is imbedded in fatty tissues no infections have arisen. See *Warbasse on Surgical Treatment*, Vol. 1, page 222; *Practitioners' Library of Medicine & Surgery*, Vol. 5, page 13.

We submit that there is nothing in this record to justify a reversal of the action of the Court below and that the verdict of the jury and the judgment rendered thereon should not be disturbed.

Respectfully submitted,

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